

No. 12908

United States
Court of Appeals

for the Ninth Circuit

J. J. McDONELL,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee of the Estate of
Hacker-Byrnes Corporation, bankrupt,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California
Central Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF
ATTORNEYS

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For Appellee:

CRAIG, WELLER & LAUGHARN,
817, 111 West 7th Street,
Los Angeles 14, Calif. [1*]

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In the District Court of the United States
for the Southern District of California,
Central Division

In Bankruptcy No. 47485-M

In the Matter of

HACKER-BYRNES CORPORATION,
Alleged Bankrupt.

CREDITORS' INVOLUNTARY PETITION

To the Honorable Judges of the District Court of
the United States, Southern District of Cali-
fornia:

The verified petition filed by Murray B. Marsh
Co., Inc., Edward J. Roberts Co., Inc., and Century
Floor Coverings, Inc., respectfully shows:

I.

That the alleged bankrupt, Hacker-Byrnes Cor-
poration, which now has, and has had its principal
place of business at 1240 South Broadway, Los An-
geles, California in the Southern District of Cali-
fornia within the judicial district above named for
a period of the greater portion of the six months
immediately preceding the filing of this petition.

II.

That the alleged bankrupt is engaged in the whole-
sale and retail selling of floor coverings at the said

address and is not a wage earner, farmer, banking institution, insurance company or building and loan company.

III.

That your petitioners are creditors of said alleged bankrupt and hold provable claims against it, fixed as to liabilities [2] and liquidated as to amount, amounting in the aggregate in excess of the value of securities held by them, to the sum of more than \$500.

IV.

That the nature and amount of your petitioners' claims are as follows:

That the alleged bankrupt is indebted to your petitioner, Murray B. Marsh Co., Inc., in the sum of \$26,657.20 as and for goods, wares and merchandise, owing by said alleged bankrupt to your petitioner within four years last past of the reasonable market value of \$26,657.20, no part of which has been paid, and the whole thereof is due, owing and unpaid, and that at all times herein mentioned was, has been and now is a Washington corporation.

That the alleged bankrupt is indebted to your petitioner, Edward J. Roberts Co., Inc., in the sum of \$2,688.92 as and for goods, wares and merchandise, owing by said alleged bankrupt to your petitioner within four years last past of the reasonable market value of \$2,688.92, no part of which has been

paid, and the whole thereof is due, owing and unpaid, and that at all times herein mentioned was, has been and now is a California corporation.

That the alleged bankrupt is indebted to your petitioner, Century Floor Coverings, Inc. in the sum of \$8,899.34 as and for goods, wares and merchandise, owing by said alleged bankrupt to your petitioner within four years last past of the reasonable market value of \$8,899.34, no part of which has been paid, and the whole thereof is due, owing and unpaid, and that at all times herein mentioned was, has been and now is a California corporation.

V.

Your petitioners allege, that the alleged bankrupt owes debts in excess of the sum of \$1,000 and is insolvent at the present time and at the times mentioned hereinafter, and that the said alleged bankrupt has committed an act of bankrupt in that it made, [3] executed and delivered on March 21, 1949, within four months of the filing of this petition, a general assignment for the benefit of creditors to M. W. Engleman, 1501 West Eighth Street, Los Angeles, California.

Wherefore, your petitioners pray that the service of this petition, together with the subpoena, may be made upon the said alleged bankrupt as provided in the Acts of Congress relating to bankruptcy, and

that it may be adjudged by this Court to be a bankrupt within the purview of this Act.

Dated: April 27, 1949.

MURRAY B. MARSH CO., INC., a
Washington corporation,

/s/ By E. W. NELSON,
Secretary.

EDWARD J. ROBERTS, CO., INC.,
a California corporation,

/s/ By EDWARD J. ROBERTS,
President.

CENTURY FLOOR COVERINGS,
INC., a California corporation,

/s/ By JOSEPH H. WEISMAN,
President.

CRAIG, WELLER & LAUGHARN,

/s/ B. FRANK C. WELLER,
Attorneys for Petitioning Creditors.

Oath to Petition

United States of America,
Southern District of California,
County of Los Angeles—ss.

E. W. Nelson, Secretary of Murray B. Marsh Co.,
Inc. petitioning creditor herein, does hereby make
solemn oath that the statements made in the fore-
going Petition subscribed by him are true.

/s/ E. W. NELSON,
Secretary.

Subscribed and sworn to before me this 27th day
of April, 1949.

[Seal] /s/ M. E. MARSH,
Notary Public in and for said County and State

United States of America,
Southern District of California,
County of Los Angeles—ss.

Edward J. Roberts, President of Edward J. Rob-
erts Co., Inc., petitioning creditor herein, does here-
by make solemn oath that the statements made in
the foregoing Petition subscribed by him are true.

/s/ EDWARD J. ROBERTS,
President.

Subscribed and sworn to before me this 27th day
of April, 1949.

[Seal] /s/ M. E. MARSH,
Notary Public in and for said County and State

United States of America,
Southern District of California,
County of Los Angeles—ss.

Joseph H. Weisman, President of Century Floor Coverings, Inc., petitioning creditor herein, does hereby make solemn oath that the statements made in the foregoing Petition subscribed by him are true.

/s/ JOSEPH H. WEISMAN,
President.

Subscribed and sworn to before me this 27th day of April, 1949.

[Seal] /s/ M. E. MARSH,
Notary Public in and for said County and State

[Endorsed]: Filed April 27, 1949.

[Title of District Court and Cause.]

ORDER OF GENERAL REFERENCE

At Los Angeles, California, in said district on the 27th day of April, 1949;

Whereas, a petition was filed in this court on the 27th day of April, 1949, against Hacker-Byrnes Corporation, alleged bankrupt above named, praying that it be adjudged a bankrupt under the Act of Congress relating to bankruptcy, and good cause now appearing therefor;

It is ordered that the above-entitled proceeding be, and it hereby is, referred to Benno M. Brink, Esq., one of the referees in bankruptcy of this court, to take such further proceedings therein as are required and permitted by said Act, and that the said Hacker-Byrnes Corporation shall henceforth attend before said referee and submit to such orders as may be made by him or by a judge of this court relating to said bankruptcy.

/s/ PAUL J. McCORMICK,
District Judge.

[Endorsed]: Filed April 27, 1949. [6]

[Title of District Court and Cause.]

ADJUDICATION OF BANKRUPTCY

At Los Angeles, in said District, on the 12th day of May, 1949.

The petition of Murray B. Marsh Co., Inc.; Edward J. Roberts Co., Inc.; and Century Floor Coverings, Inc., filed on the 27th day of April, 1949, that Hacker-Byrnes Corporation be adjudged a bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered; and there being no opposing interest:

It is adjudged that the said Hacker-Byrnes Corporation is a bankrupt under the Act of Congress relating to bankruptcy.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed May 12, 1949. [7]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION
FOR REVIEW OF ORDER ON OBJEC-
TIONS TO CLAIMS OF J. J. McDONELL

To the Honorable Paul J. McCormick, Chief Judge
of the Above Entitled Court:

I, Benno M. Brink, one of the Referees in Bankruptcy of the said Court, before whom the above entitled matter is pending under an order of general reference, do hereby certify to the following:

J. J. McDonell, a claimant herein, has duly filed his petition for the review of an order made by your Referee in this matter on April 26, 1950, in which, among other things, he decreed that the claims filed by the said J. J. McDonell in this proceeding should be subordinated in payment to the claims of all other general creditors in this case.

The Proceedings

On March 21, 1949, the above named Hacker-Byrnes Corporation made a general assignment for the benefit of its [8] creditors to one M. W. Engleman. On April 27, 1949, a petition in involuntary bankruptcy was filed herein against the said corporation and on May 12, 1949, an order of adjudication was entered upon the said petition. Thereafter, on June 8, 1949, Paul W. Sampsell was appointed as trustee in bankruptcy in this matter.

On May 7, 1949, J. J. McDonell, the petitioner on review, filed two claims in this proceeding, one for

\$600.00 as a prior labor claim, and the other for \$16,064.00 as a general labor claim. On December 14, 1949, the said trustee filed his objections to the said claims and the said objections were duly heard by your Referee on January 11 and January 20, 1950. At the same time, your Referee heard objections filed by the said trustee to claims asserted in this matter by Edmund G. Egan, Everett M. Gregory, Alice C. Harris and Roy B. Smith.

Thereafter, on April 26, 1950, your Referee filed herein his Findings of Fact, Conclusions of Law and Order upon each and all of the aforesaid objections. In his said order your Referee decreed, among other things, that the priority asserted by the said J. J. McDonell in his aforesaid claim for \$600.00 should be denied; that the said claim should be allowed as a general claim; that the aforesaid claim filed by the said J. J. McDonell for \$16,064.00 should be allowed as a general claim; and that both of said claims should be subordinated in payment to the claims of all other general creditors herein. It is from your Referee's said order of subordination that this review is taken.

The aforesaid Edmund G. Egan has also filed a petition for the review of your Referee's aforesaid order of April 26, 1950, and your Referee's certificate on the said petition is being filed simultaneously herewith. No other petitions [9] for review have been filed by any of the aforesaid claimants. However, Glenn G. Savage, another labor claimant in this case, has filed a petition for the review of an

order made by your Referee upon objections filed to his claim and your Referee's certificate upon the said petition is being filed contemporaneously herewith.

The Questions Presented

The questions presented by this review are set forth in detail on pages 1 to 3 of the petition for review which is going up with this certificate but, in the opinion of your Referee, the said questions may be briefly stated as follows:

Should the claims of J. J. McDonell be subordinated in payment to the claims of all other general creditors in this case?

The Evidence

The evidence in this matter will be found in the reporter's transcript and in the exhibits, all of which are going up with this certificate.

Referee's Findings of Fact, Conclusions of Law and Order

The original of your Referee's Findings of Fact, Conclusions of Law and Order in this matter is going up with this certificate.

Papers Submitted

The following papers are herewith transmitted:

1. Photostat of claim of J. J. McDonell for \$600.00, filed May 7, 1949.

2. Photostat of claim of J. J. McDonell for \$16,064.00, filed May 7, 1949.

3. Objections to the claims of J. J. McDonell, filed December 14, 1949.

4. Findings of Fact, Conclusions of Law and Order on Objections to Various Claims, filed April 26, 1950. [10]

5. Petition of J. J. McDonell for Review of Order on Objection to his Claim, filed May 5, 1950.

6. The following exhibits: Claimant's Exhibit A for Identification, filed January 20, 1950. Trustee's Exhibit 1, filed January 20, 1950.

7. Reporter's transcript of hearing on objections to claims, filed June 22, 1950.

Respectfully submitted this 11th day of July, 1950.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed July 11, 1950. [11]

[Title of District Court and Cause.]

PROOF OF CLAIM IN BANKRUPTCY

State of California,

County of Los Angeles—ss.

J. J. McDonell, of No. 3114 West 78th Street, in Los Angeles, county of Los Angeles, State of California, being duly sworn, deposes and says:

* * *

2. That the above-named bankrupt (or debtor) was at and before the filing by (or against) him of the petition herein (for adjudication of bankruptcy), and still is, justly and truly indebted (or liable) to said deponent (or copartnership or corporation), in the sum of Six Hundred dollars (\$600.00).

3. That the consideration of said debt (or liability) is as follows: Wages earned by claimant within three (3) months before the date of the commencement of these proceedings.

4. That no part of said debt (or liability) has been paid, except (allowed as general and subordinated 4-26-50.)

* * *

9. This claim is filed as an Priority Claim.

/s/ J. J. McDONELL,

(Name of individual agent, officer, or partner making oath.)

Subscribed and sworn to before me this 4th day of May, 1949.

/s/ P. P. BENJAMIN,

(Official character)

Power of Attorney:

Said claimant hereby authorizes (11) Paul P. Benjamin of 756 So. Broadway, Room 1425, Los Angeles 14, Calif. or any of them, with full power of substitution, to attend all meetings of creditors of the bankrupt aforesaid, and all adjournments thereof, at the places and times appointed by the court, and for him and in his name to vote for or against any proposal or resolution that may be then submitted under the Act of Congress delating to bankruptcy, to vote for a trustee or trustees of the estate of the said bankrupt and for a committee of creditors, to accept any arrangement or wage-earner's plan proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends, and payment or delivery of money or of other consideration due said claimant under such arrangement or wage-earner's plan, and for any other purpose in said claimant's interest whatsoever; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid.

Designation of address to which notices shall be addressed: Said claimant hereby requests that all notices to which he may be entitled shall be addressed to the person named in the foregoing Power of Attorney, at his address as therein designated; if no person is named in said Power of Attorney, said claimant requests that said notices be sent to him at the following addresses:

[Endorsed]: Filed May 7, 1949. [12]

Title of District Court and Cause.]

PROOF OF CLAIM IN BANKRUPTCY

State of California,
County of Los Angeles—ss.

J. J. McDonell of No. 3114 West 78th Street, in
Los Angeles, county of Los Angeles, State of Cali-
fornia, being duly sworn, deposes and says:

* * *

2. That the above-named bankrupt (or debtor)
was at and before the filing by (or against) him of
the petition herein (for adjudication of bankruptcy),
and still is, justly and truly indebted (or liable) to
said deponent (or copartnership or corporation), in
the sum of Sixteen Thousand and Sixty-Four Dol-
ars (\$16,064.00).

3. That the consideration of said debt (or lia-
bility) is as follows: Wages earned, due and owing.

4. That no part of said debt (or liability) has been
paid except (Allowed as general and subordinated
-26-50.)

* * *

9. This claim is filed as an Unsecured Claim.

/s/ J. J. McDONELL,

Name of individual, agent, officer, or partner mak-
ing oath)

Subscribed and sworn to before me this 4th day of
May, 1949.

/s/ P. P. BENJAMIN

(Official character)

Power of Attorney:

Said claimant hereby authorizes (11) Paul P. Benjamin of 756 So. Broadway, Room 1425, Los Angeles 14, California, or any of them, with full power of substitution, to attend all meetings of creditors of the bankrupt aforesaid, and all adjournments thereof, at the places and times appointed by the court, and for him and in his name to vote for or against any proposal or resolution that may be then submitted under the Act of Congress delating to bankruptcy, to vote for a trustee or trustees of the estate of the said bankrupt and for a committee of creditors, to accept any arrangement or wage-earner's plan proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends, and payment or delivery of money or of other consideration due said claimant under such arrangement or wage-earner's plan, and for any other purpose in said claimant's interest whatsoever; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid.

Designation of address to which notices shall be addressed: Said claimant hereby requests that all notices to which he may be entitled shall be addressed to the person named in the foregoing Power of Attorney, at his address as therein designated; if no person is named in said Power of Attorney, said claimant requests that said notices be sent to him at the following addresses:

[Endorsed]: Filed May 7, 1949. [13]

[Title of District Court and Cause.]

OBJECTIONS TO CLAIMS AND NOTICE OF HEARING OF OBJECTIONS

The undersigned, the duly elected, qualified and acting Trustee in Bankruptcy herein, files his objections to claims which have been filed in these proceedings, and as and for his objections thereto, alleges as follows:

J. J. McDonell (Nos. 7 and 8)	\$ 600.00
c/o Paul P. Benjamin	16,064.00
425 Chapman Building	
Los Angeles, California	

Your trustee alleges that claim No. 7 filed in the amount of \$600.00 as a prior labor claim under the provisions of Sec. 64a-2 is not entitled to a priority under the said Section on the grounds that the said claimant was General Manager and Sales Manager of the bankrupt corporation, and was not the servant or clerk thereof; that he directed the activities of the corporation and had under his supervision a large number of employees.

The claimant has filed as claim No. 8 a general claim in the amount of \$16,064.00. Your trustee alleges that no such sum is now due or owing to the said claimant and that therefore this claim should not be allowed even as a general claim, but should be rejected and disallowed in full. Insofar as the aforesaid claim for \$600.00 is denied priority, your trustee alleges that no portion of that sum is due

or owing as a general claim and that it should be disallowed.

Wherefore, your Trustee prays that his Objections be heard and appropriate Orders be made in the premises.

/s/ PAUL W. SAMPSELL
Trustee in Bankruptcy.

To the Above Creditors and Their Attorneys:

You Are Hereby Notified that the Trustee in Bankruptcy herein has made and filed herein his written Objections to claims, as hereinbefore set forth, and the same have been set for hearing before the Honorable Benno M. Brink, Referee in Bankruptcy, in the Federal Building, Los Angeles, California, on the 11th day of January, 1950, at the hour of 2:00 o'clock p.m.

Dated: December 13, 1949.

CRAIG, WELLER & LAUGHARN,

/s/ By C. E. H. McDONELL,

Attorneys for Trustee.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Dec. 14, 1949. [14]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER ON OBJECTIONS TO
VARIOUS CLAIMS

Mr. J. J. McDonell having filed his claims herein in the sum of \$16,064.00 and in the sum of \$600.00, which latter claim is contended to be entitled to prior payment as a wage claim under 64(a)2 of the Bankruptcy Act; and Edmund G. Egan having filed his claim herein in the sum of \$4,269.27; and Everett M. Gregory having filed his claim in the amount of \$6,169.96; and Alice C. Harris having filed her claim in the sum of \$725.00 herein; and Roy B. Smith having filed his claim in the sum of \$1,400.00 herein, and the trustee having objected to the allowance of all the foregoing claims on any basis whatsoever and the said objection having regularly come on for hearing before the undersigned Referee in bankruptcy on January 11, 1950, at the hour of 2:00 p.m. and having been continued to the 20th day of January 1950, at the hour of 2:00 p.m. for the purpose of taking additional evidence, the said trustee having appeared and being represented by his attorneys Craig, Weller & Laugharn by C. E. H. McDonell, and the claimant J. J. McDonell having appeared in person and represented by his attorneys Benjamin & Kronick by Robert I. Kronick, and the claimant Edmund G. Egan having appeared in per-

son and represented by his attorney James A. Gilbert, and the claimants Everett M. Gregory, [16] Alice C. Harris and Roy B. Smith having appeared pro-per; evidence both oral and documentary having been submitted and the Referee being fully advised in the premises the Court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

That the claimant J. J. McDonell entered the employment of the bankrupt corporation September 15, 1947, and was paid at that time a salary of \$150.00 per week; that prior to the commencing of the employment of the said claimant J. J. McDonell, representations were made to the claimant J. J. McDonell that his salary would be the sum of \$15,000.00 per year, plus 50% of the net profits of the carpet department of the bankrupt corporation, the difference between his total weekly stipend and the said \$15,000.00 to be paid at the end of one year; that in the month of November 1947 while the claimant J. J. McDonell was an officer and director of the bankrupt corporation at a Board of Directors meeting at which the said claimant was present, representations and statements were made by Mr. Al Hacker, who was at that time President and sole stockholder in the bankrupt corporation, that the

claimant J. J. McDonell was to receive, beginning January 1, 1948, a "guaranteed salary" of \$20,000.00 per year and that this "guaranteed salary" was to be paid at the rate of \$150.00 per week during the year beginning January 1, 1948, and the difference between the total of such weekly payments and the "guaranteed salary" of \$20,000.00 was to be payable at the end of the year; that at the aforesaid directors meeting statements and representations were also made by the said Al Hacker, that in addition to the foregoing "guaranteed salary" the claimant J. J. McDonell was to receive at the end of a year 15% of whatever profits were left over after the payment of any and all expenses of the bankrupt corporation, including the various "guaranteed salaries" then [17] under discussion; that the difference between the total weekly payments at a rate of \$150.00 per week and \$15,000.00 for the pro-rata portion of the year 1947 for which the claimant worked is the sum of \$2,215.00; that the difference between the weekly amounts received and the \$20,000.00 "guaranteed salary" in the year 1948, is the sum of \$13,000.00; that in the year 1949 the claimant J. J. McDonell was in the employ of the bankrupt corporation from January 1st to February 18th being paid a sum of \$150.00 per week; that the difference between the total weekly payments at the rate of \$150.00 per week and \$20,000.00 for the pro-rata portion of the year 1949 total which the claimant was employed by the bankrupt corporation, is the sum of \$1,449.00; that no representations or statements were made at the heretofore mentioned Board

of Directors meeting in the month of November 1947, at which time "guaranteed salary" of the chairman J. J. McDonald was discussed, or at any other time, or at all, by Mr. A. Hacker or any other agent, representative or officer of the bankrupt corporation as to the duration of the period for which the chairman J. J. McDonald was to receive "guaranteed salary" of \$240,000 per year; that the time of payment of the balance between the total of the weekly amounts of \$15,000 per week and the "guaranteed salary" of \$240,000 per year was never fixed by any agreement between the chairman J. J. McDonald and the bankrupt corporation; that the chairman J. J. McDonald was not at any time a stockholder in the bankrupt corporation.

II.

That at a Board of Directors meeting in the month of November 1947, while the chairman Edmund G. Egan was an officer and director of the bankrupt corporation, and at which meeting the said Edmund G. Egan was present and participated, representations and statements were made to the chairman Edmund G. Egan by Mr. A. Hacker, who was at that time President and sole stockholder of the bankrupt [18] corporation, that Egan's "guaranteed salary" would be the sum of \$240,000 per year retroactive to November 3, 1947, and that his weekly spend would be the sum of \$15,000, also retroactive to November 3, 1947; that the difference between the total of such weekly payments and the "guaranteed salary" of \$240,000 per year was represented as being payable at the end of the year, which sum is

found to be the amount of \$3,113.27; that the claimant Edmund G. Egan left the employ of the bankrupt corporation October 20, 1945; that at the aforesaid directors meeting statements and representations were also made by the said Al Hacker, that in addition to the foregoing "guaranteed salary" the claimant Edmund G. Egan was to receive at the end of a year 11.66% of whatever profits were left over after the payment of any and all expenses of the bankrupt corporation, including the various "guaranteed salaries" then under discussion; that no representations or statements were made at the heretofore mentioned Board of Directors meeting in the month of November 1947, at which time "guaranteed salary" of the claimant Edmund G. Egan was discussed, or at any other time, or at all, by Mr. Al Hacker or any other agent, representative or officer of the bankrupt corporation as to the duration of the period for which the claimant Edmund G. Egan was to receive "guaranteed salary" of \$12,000.00 per year; that the time of payment of the balance between the total of the weekly amount of \$150.00 per week and the "guaranteed salary" of \$12,000.00 per year was never fixed by an agreement between the claimant Edmund G. Egan and the bankrupt corporation; that the claimant Edmund G. Egan was not at any time a stockholder of the bankrupt corporation.

That at a Board of Directors Meeting in the month of November 1947, while the claimants J. J. McNeill and Edmund G. Egan were officers and directors of the bankrupt corporation and while one Leon G. Savage was an officer of the bankrupt cor-

poration, in which meeting the said claimants Egan and McDonell participated, [19] and at which the said Glenn G. Savage was present, it was agreed that the following "guaranteed salaries" would thereafter be paid: Al Hacker \$50,000.00 a year plus 50% of the net profits; J. J. McDonell \$20,000.00 a year plus 15% of the net profits; Edmund G. Egan \$12,000.00 a year plus 11.66% of the net profits; Glenn G. Savage \$12,000.00 per year plus 11.66% of the net profits; Robert W. Schuler \$12,000.00 per year plus 11.66% of the net profits.

III.

That the claimant J. J. McDonell was at all times during his employment by the bankrupt; in charge of the carpet department at the "Wilshire Store" and had under his supervision and direction at all times a number of employees, and that from and after November of 1947 he was the General Manager of the bankrupt corporation; that the claimant Edmund G. Egan was at all times during his employment by the bankrupt in charge of its contract sales.

IV.

That except as shall hereinafter be set forth in more detail, the claimant J. J. McDonell received the sum of \$150.00 per week from January 1, 1948 until February 18, 1949 and the claimant Edmund G. Egan received the sum of \$150.00 per week from and after November 5, 1947 until May 12, 1948 from and after which time Egan received the sum of \$100.00 per week.

V.

That on or about May 12, 1948, certain reductions were made in the weekly amounts paid to various employees of the bankrupt corporation, as follows:

	Amount prior to 5-12-48	Amount from and after 5-12-48
Edmund G. Egan.....	\$150.00 Wk.	\$100.00 Wk.
J. J. McDonell.....	150.00 “	100.00 “
Alice C. Harris.....	125.00 “	100.00 “
Everett M. Gregory.....	125.00 “	100.00 “
Roy B. Smith.....	150.00 “	100.00 “

That the hereinabove set forth reductions in weekly payments were at all times maintained from and after May 12, 1948 while the aforesaid employees were in the employ of the bankrupt corporation; that as set forth hereinabove, amounts paid by the bankrupt corporation to the claimant J. J. McDonell from and after May 12, 1948, was the sum of \$100.00 per week, but at all times from and after May 12, 1948, the President of the bankrupt corporation, Al Hacker, paid from his own funds and in his own individual capacity to the claimant J. J. McDonell an amount of \$50.00 per week so as to effectively restore to the claimant J. J. McDonell the ostensible reduction in his weekly payment from and after May 12, 1948.

VI.

That no promises, representations or statements of any kind or nature whatsoever were made to any of the employees of the bankrupt corporation, that the losses experienced by the reductions in weekly payments on or about May 12, 1948, would be restored.

VII.

That there were no representations, promises or statements of any kind whatsoever by any member, agent or officer of the bankrupt corporation to any of the employees of the said bankrupt corporation that any bonuses would be paid to them at Christmas time or any other time in return for faithful service.

VIII.

That there were no representations or promises at any time by any member of the bankrupt corporation or any agent thereof to any employee of the said bankrupt corporation that any of the employees would be entitled as a matter of right, to any vacation or any pay in lieu of said vacation.

IX.

That there were no promises, representations or statements of any kind or nature whatsoever at any time by any member [21] of the bankrupt corporation or any agent or officer thereof to Everett M. Gregory that the said Everett M. Gregory would receive a "guaranteed salary" of \$12,000.00 per year.

X.

That throughout the year 1948 the bankrupt corporation was experiencing financial difficulties due to shortage of liquid capital; that the bankrupt corporation made a general assignment for the benefit of creditors on the 21st day of March 1949; that an Involuntary Petition in Bankruptcy was filed on the 27th day of April 1949; that the schedules filed by the bankrupt corporation herein show total liabilities in the amount of \$156,943.91 as against total assets

in the amount of \$55,389.08; that there were in existence at the time of the filing of the aforesaid petition in bankruptcy, creditors whose claims arose and became due and owing prior to November 1947; that there will be insufficient assets in this bankrupt estate to pay all general unsecured creditors in full.

Conclusions of Law

I.

That there is an enforceable contract between the claimant J. J. McDonell and the bankrupt corporation whereby the claimant J. J. McDonell from and after September 15, 1947 was to receive a minimum payment of \$150.00 per week with the maximum compensation of \$15,000.00 per year, plus the balance between the \$150.00 per week minimum and the \$15,000.00 maximum to be payable at the end of a year; that the said enforceable contract also provided that the claimant J. J. McDonell was to receive 50% of the net profits of the carpet department; the said contract was terminated by mutual agreement through the substitution of another employment contract as set forth hereinafter.

II.

That there was an enforceable contract between the claimant J. J. McDonell and the bankrupt corporation whereby from and after [22] January 1, 1948, the said claimant J. J. McDonell was to receive a "guaranteed salary" of \$20,000.00 per year, payable without regard as to whether a profit was made by the bankrupt corporation and that by the

terms of the said contract, claimant J. J. McDonell in addition to the foregoing “guaranteed salary”, was entitled to receive 15% of any net profits of the corporation.

III.

That there was a contract between the claimant Edmund G. Egan and the bankrupt corporation whereby from and after November 5, 1947, the said claimant Edmund G. Egan was to receive a “guaranteed salary” of \$12,000.00 per year, payable without regard as to whether a profit was made by the bankrupt corporation and that by the terms of the said contract, claimant Edmund G. Egan in addition to the aforementioned “guaranteed salary” was entitled to receive 11.66% of any net profits of the corporation.

IV.

That each and all of the aforesaid enforceable contracts were not fair, equitable or just and are not fair, equitable or just, as against the creditors of the bankrupt corporation, for these reasons, among others, to-wit: (1) that from and after November of 1947, the claimants, McDonell and Egan, were officers and directors of the bankrupt corporation and, as such, were charged with the responsibility of providing for the payment of all of the just obligations of the bankrupt corporation, which was not done for it appears that at the date of the termination of its business the corporation was heavily indebted to its creditors and its liabilities were substantially in excess of its assets; (2) that the “guaranteed salaries” aforesaid were excessive and unreasonable in the light of the ability of the bank-

rupt corporations to pay the same and, at the same time, to discharge the obligations which it incurred while the said salaries were being earned; (3) that the rights given to the said claimants [23] to participate in the profits, if any, of the bankrupt corporation and the postponement of the time of payment of a substantial portion of their respective "guaranteed salaries" to the rather indefinite time of the expiration of one year, gave the said claimants an unfair and inequitable advantage over the creditors of the bankrupt corporation in that, if the corporation prospered during the period of the aforesaid postponement, the claimants would collect their said salaries in full and, at the same time, would be entitled to their respective shares of the profits earned in such period; whereas, if, in such period, the corporation did not prosper and no profits were earned, the claimants would still be entitled to claim the unpaid portions of their respective salaries on a parity with all other creditors of the corporation, including the creditors to whom the corporation became indebted during the period of such postponement; and, furthermore, the said postponement of the time of payment of a portion of said "guaranteed salaries" resulted in the accumulation of liabilities by the corporation for the payment of such salaries during a period when it was unable to actually pay the same and thus the said postponement was a factor in keeping the corporation in business and in the incurring by it of further liabilities to creditors which it was eventually unable to pay; whereas, if the said "guaranteed salaries" had all

been payable in normal installments, the corporation, if it had been unable to pay the same when due, might have been compelled to discontinue its operations and might thus have avoided incurring the said further liabilities which eventually it was unable to pay; (4) that when one considers the substantial amounts of the aforesaid "guaranteed salaries" and the substantial percentages of the profits of the bankrupt corporation to which the said claimants were entitled, one is impressed with the idea that the relationship of each of the said claimants was more of the character of the relationship of a partner or a joint adventurer, rather than that of a profit sharing [24] employee and, hence, that the said claimants, in equity, are not entitled to any greater rights, as against the creditors of the corporation, than partners or joint adventurers would have, even though the said claimants may have none of the liabilities to such creditors such as partners or joint adventurers might have.

V.

That the claimant J. J. McDonell was not a workman, servant, clerk or salesman within the meaning as applied by the Courts to those terms as they appear in Section 64(a)2 of the National Bankruptcy Act, but that the said claimant J. J. McDonell was at all times in a supervisory and managerial capacity and his wages do not fall within the scope of Section 64(a)2 of the Bankruptcy Act.

VI.

That there was no enforceable contract made or entered into between the bankrupt corporation and

ts employees to restore to them reductions made in their weekly payments and weekly salaries in the month of May 1948.

VII.

That there was no contract between the bankrupt corporation and any of its employees guaranteeing yearly vacation and payment of wages in lieu hereof.

VIII.

That there was no contract between the bankrupt corporation and any of its employees to pay any guaranteed bonuses at Christmas or any other time.

IX.

That there was no contract between the bankrupt corporation and the claimant Everett M. Gregory, to pay any guarantee over and above the weekly salary of \$100.00 per week paid to the said claimant Everett M. Gregory.

Based upon the preceding Findings of Fact and Conclusions [25] of Law, it is hereby

Ordered that the claim of J. J. McDonell in the amount of \$600.00 filed in the within proceedings for which priority is claimed under Section 64(a)2 of the Bankruptcy Act, be and it hereby is denied priority and is allowed as a general claim, and

It Is Further Ordered that the claim of J. J. McDonell on file herein in the sum of \$16,064.00 be and the same hereby is allowed as a general claim herein; and the said \$16,064.00 and the claim filed in the

amount of \$600.00 as aforesaid be and the same are subordinated in payment to the claims of all other general creditors, the said claims to receive no payment or dividend whatsoever until other allowed general claims have been paid in full; and

It Is Further Ordered that the claim of Edmund G. Egan on file herein in the sum of \$4,269.27 be and the same hereby is allowed in the sum of \$3,119.27 as a general claim in the within proceedings; and the said claim in the amount of \$3,119.27 as aforesaid be and the same is subordinated in payment to the claims of all other general creditors, the said claims to receive no payment or dividend whatsoever until other allowed general claims have been paid in full; and

It Is Further Ordered that the claim of Everett M. Gregory in the sum of \$6,169.86 be and the same hereby is reduced to the sum of \$100.00 and allowed in the said amount as a general unsecured claim, and

It Is Further Ordered that the claims of Alice C. Harris in the sum of \$725.00 and Roy B. Smith on file in the sum of \$1,400.00 be and the same hereby are disallowed.

Dated: April 26, 1950.

/s/ BENNO BRINK,

Referee in Bankruptcy. [26]

[Endorsed]: Filed April 26, 1950.

[Title of District Court and Cause.]

PETITION OF J. J. McDONELL FOR REVIEW
OF ORDER ON OBJECTION TO HIS
CLAIM

The Petitioner, J. J. McDonell filed two wage claims against the above entitled bankrupt, one in the sum of \$16,064.00 as a General Claim and one for \$600.00 as a preferred wage claim under Section 64(a)2 of the Bankruptcy Act. The Trustee in bankruptcy filed objections to both claims and asked that the same be disallowed. After a contested hearing hereon, the Referee in bankruptcy disallowed the claim of priority but allowed both claims as General Claims against the above bankrupt. However, under his Order dated April 26, 1950, the Referee subordinated the payment of said claims to all other general creditors. This Petition for Review is only directed against the aforesaid portion of said order relating to said subordination.

That said Order of April 26, 1950 was and is erroneous with respect to the subordination of said claim, for the following reasons:

(1) The subordination of Petitioner's claim is based upon the fact that he was an officer and director of the corporation when the contract for his salary was made and that said [27] contract was not fair, equitable or just as against the creditors of the bankrupt corporation. In this connection, the Findings of Fact are not substantiated by the testimony taken upon the hearing, which in brief was as follows: The sole stockholder at the time the contract

was made with the Petitioner was Mr. Al Hacker, That the Petitioner, J. J. McDonell was not a stockholder of the bankrupt corporation, nor did he then or at any time have any financial interest therein, but came there purely as an employee in charge of the carpet department at a salary of \$15,000.00 per year plus 50% of the net profits of the carpet department. That prior to his employment by the bankrupt corporation, he earned approximately said amount annually as an employee of Walton N. Moore Dry Goods Co. Inc. That he had approximately twenty-five years experience in the carpet and floor coverings business. That he was made a director and officer by Hacker approximately two months after his employment by the bankrupt corporation at a time when said Hacker had just purchased the stock of one Byrnes and had become the holder of all of the outstanding stock of said corporation. That said Al Hacker made the Petitioner an officer and director of said corporation as a matter of convenience only because he had to have three directors for his corporation. He also made him General Manager of the corporation at an increased minimum salary of \$20,000.00 per year.

Petitioner contends that he was only a "dummy" director and officer and considered himself just a salaried employee and as soon as certain persons came into the corporation with new financing, he was immediately removed as an officer and director. He was not an officer or director at the time of the assignment for the benefit of creditors or the adjudication in bankruptcy.

(2) That there is no testimony that at the time the contract was entered into with the Petitioner, J. J. McDonell, [28] that the bankrupt corporation was insolvent.

(3) That the bankrupt corporation handled some of the largest floor covering jobs in Los Angeles, among them the complete installation of floor coverings in the new General Petroleum Building at Sixth and Flower Streets, Los Angeles and other transactions which involved large sums of money. That the amounts agreed to in the contracts of employment entered into by the Petitioner with the bankrupt corporation, are reasonable for the services rendered, based on the experience of said Petitioner.

(4) That no action or conduct on the part of the Petitioner caused said corporation to become insolvent. A reference to the file in the above numbered bankruptcy, will show that same was caused by purported withdrawal of assets by the principal stockholders and new officers of the corporation and that the Referee has made an order instructing the Trustee to file suits against them to recover amounts alleged to be in excess of \$100,000.00.

(5) The testimony also shows that up to the time that other persons came into the business, that the bankrupt corporation was a one man affair, dominated by the said Al Hacker, its sole stockholder and President.

(6) That the claim of this Petitioner was filed in good faith and that there was no fraud or unfairness whatsoever involved in his dealings with the corporation. The mere fact that he happened to

be an officer or director who thereafter files a claim against the corporation, will not prevent an allowance of his claim on a parity with the other creditors, where no fraud or unfairness is involved. There must be a showing that the allowance of this claim would be an unjust and unfair enrichment of the Petitioner before a court of equity can cause his claim to be subordinated to other creditors. In re: [29] *Kansas City Journal Post*, 144 Fed. (2d) 791. No such showing was made, but on the contrary, it was proved that his actual earnings prior to his employment with the bankrupt corporation were approximately at the same rate as that which he claims from the bankrupt corporation.

Subordination is usually ordered in the case of one man corporations where the controlling stockholder makes claims for money loaned to the corporation or for salary for services rendered to it. *Pepper vs. Litton*, *American Bankruptcy Reports*, N.S. Vol. 4, 290.

Wherefore, Petitioner prays that said order of April 26, 1950 be reversed insofar as it subordinates Petitioner's claim to all other general creditors and that said Referee be directed to enter forthwith, an order allowing Petitioner's claim as a general claim, without subordination, and for general relief.

Dated: May 5, 1950.

BENJAMIN & KRONICK

/s/ By ROBT. I. KRONICK,

Attorneys for Petitioner,

J. J. McDonell.

Note

Petitioner requests the following documents to be transmitted to the Judge upon this review:

(1) Objections of Trustee to approval of Petitioner's claims.

(2) Certified copy of Findings of Fact, Conclusions of Law and Order Approving Petitioner's claims, but subordinating payment of same to other general creditors, dated April 26, 1950.

(3) Reporter's Transcript of proceedings before Referee on January 11th and January 20th, 1950, including only testimony [30] of witnesses Hacker, McDonell, Egan, Major, Alice C. Harris and attorney Leo Gold.

(4) This Petition for Review.

(5) Referee's Certificate on Review.

(Duly certified.)

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 5, 1950. [32]

In the District Court of the United States
for the Southern District of California,
Central Division

In Bankruptcy No. 47,485-M

In the Matter of

HACKER-BYRNES CORPORATION,
Bankrupt.

ORDER CONFIRMING REFEREE'S ORDERS
ON OBJECTIONS TO CLAIMS OF J. J.
McDONELL, EDMUND G. EGAN AND
GLENN G. SAVAGE

Upon consideration and study of the entire record, including transcripts of proceedings and evidence before the Referee in Bankruptcy on January 11th and 20th, 1950, and on February 24, 1950, the Court cannot say that the Referee erroneously subordinated the claims of J. J. McDonell or Edmund G. Egan or Glenn G. Savage. Accordingly, the orders of the Referee dated April 26, 1950, subordinating the claims of the aforesaid three claimants are and each is confirmed.

General Orders in Bankruptcy 36, 47;
Federal Rules of Civil Procedure, Rule 52, 28
U.S.C.A.;

Pepper v. Litton, 308 U.S. 295;

Prudence Corp. v. Geist, 316 U.S. 89.

In amplification of the foregoing confirmatory rulings, we think the record before us shows that

he Referee in Bankruptcy was confronted with the necessity of choosing between creditors solely in the unsecured category of claimants. Cf. *In re Kansas City Journal-Post Co.*, 144 F.2d 791. And after extended hearings herein, oral [38] and documentary evidence was elicited from which, after argument by the attorneys for the respective parties, the Referee made comprehensive findings of fact as to the comparable status of claimants and the other unsecured creditors of the bankrupt estate and concluded that because of the disparity which would result if the trustee's attack upon the salary claims be wholly nullified he subordinated such claims here under review to those of the other unsecured creditors upon equitable principles. We think he pursued the line of established law in so doing and that his orders under review should not be disturbed.

Dated February 21, 1951.

/s/ PAUL J. McCORMICK,

United States District Judge.

[Endorsed]: Filed February 21, 1951. [39]

[Title of District Court and Cause.]

NOTICE OF APPEAL BY J. J. McDONELL,
CLAIMANT

Notice Is Hereby Given that J. J. McDonell, the above named claimant, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the Order Confirming the Referee's Order on Objections to the claims of said J. J. McDonell and others, entered in this matter on the 21st day of February, 1951, insofar as said order affects the rights of or applies to said claimant.

Dated: March 20th, 1951.

BENJAMIN & KRONICK

/s/ By ROBT. I. KRONICK,

Attorneys for J. J. McDonell,
Claimant.

Service by mail attached.

[Endorsed]: Filed March 21, 1951. [40]

[Title of District Court and Cause.]

COST BOND ON APPEAL
Continental Casualty Company

Bond No. 1,508,284

Premium: \$10.00

Whereas J. J. McDonnell and only J. J. McDonnell has appealed to the U. S. Circuit of Appeals, Ninth Circuit, from an order confirming referee's order on objections to claim of him and others on February 21st, 1951, by Paul J. McCormick, Judge

in the United States District Court, Southern District of California, Central Division,

Now, Therefore, in consideration of the premises and of such appeal, the Continental Casualty Company, incorporated under the laws of the State of Illinois and authorized to execute bonds and undertakings as sole Surety, does hereby undertake and promise on the part of the said Appellant, that the said Appellant will pay all costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding the sum of Two Hundred Fifty (\$250.00) Dollars, to which amount it acknowledges itself bound.

Signed, sealed and dated this 20th day of March, 1951.

[Seal]

CONTINENTAL CASUALTY
COMPANY

/s/ STUART S. ROUGH,
Attorney-in-Fact.

State of California,
County of Los Angeles—ss.

On this 20th day of March, 1951, before me, O. S. Demeter, a Notary Public in and for the County and State aforesaid, residing therein, duly commissioned and sworn, personally appeared Stuart S. Rough, known to me to be the person whose name is subscribed to the foregoing instrument as the Attorney-in-Fact of the Continental Casualty Company, and acknowledged to me that he subscribed the name of

the Continental Casualty Company thereto and his own name as Attorney-in-Fact.

[Seal] *s/* O. S. DEMETER,

Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires Aug. 3, 1954.

[Endorsed]: Filed March 21, 1951. [41]

[Title of District Court and Cause.]

APPELLANT J. J. McDONELL'S DESIGNA-
TION OF RECORD ON APPEAL

To the Clerk of the above-entitled Court:

J. J. McDonell, appellant above named, hereby designates the following portions of the record to be contained in the record on appeal in the above entitled matter:

(1) Involuntary Bankruptcy Petition against Hacker-Byrnes Corporation.

(2) Petition for Order referring proceedings to a referee.

(3) Order of General Reference.

(4) Order of Adjudication.

(5) Two claims of J. J. McDonell.

(6) Objections of Trustee in Bankruptcy to claims of J. J. McDonell.

(7) A transcript of the evidence taken before Honorable Benno M. Brink, Referee in Bankruptcy on January 11, 1950 and January 20, 1950, being that portion of the reporter's transcript of hearings on objection to claims, prepared by H. A. Singeltary,

commencing at Line 12, Page 34 with the testimony of J. J. McDonell, [42] to and including Line 16, Page 136 and commencing at Line 1, Page 140 to and including Line 26, Page 165.

(8) Findings of Fact and Conclusions of Law and Order on objection to claims, signed by Referee Brink.

(9) Petition of J. J. McDonell for Review of Order on Objection to his Claim.

(10) Referee's Certificate on Petition for Review of Order on Objections to Claim of J. J. McDonell.

(11) Order Confirming Referee's orders on objection to claims of J. J. McDonell and others, dated February 21, 1951.

(12) Notice of Appeal.

(13) This Designation of Record on Appeal.

Dated: April 3rd, 1951.

BENJAMIN & KRONICK

/s/ By ROBT I. KRONICK,

Attorneys for claimant and Appellant, J. J. McDonell.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 3, 1951. [43]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages

numbered from 1 to 44, inclusive, contain the original Creditors' Involuntary Petition; Order of General Reference; Adjudication of Bankruptcy; Referee's Certificate on Petition for Review of Order on Objections to Claims of J. J. McDonell; Copies of Two Proofs of Claim in Bankruptcy; Objections to Claims and Notice of Hearing of Objections; Findings of Fact, Conclusions of Law and Order on Objections to Various Claims; Petition of J. J. McDonell for Review of Order on Objection to His Claim; Claimant's Exhibit A for Identification; Trustee's Exhibit 1; Order Confirming Referee's Orders on Objections to Claims of J. J. McDonell, Edmund G. Egan and Glenn G. Savage; Notice of Appeal by J. J. McDonell, Claimant; Cost Bond on Appeal and Designation of Record on Appeal which, together with Reporter's Transcript of Proceedings on Hearing on Objections to Claims on January 11 and 20, 1950, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$1.60 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 20th day of April, A.D. 1951.

[Seal]

EDMUND L. SMITH,
Clerk.

/s/ By P. D. HOOSER,
Deputy Clerk.

In the District Court of the United States
for the Southern District of California
Central Division

No. 47,485-M

In the Matter of

HACKER-BYRNES CORPORATION,

Bankrupt.

Before the Honorable Benno M. Brink, Referee
in Bankruptcy.

REPORTER'S TRANSCRIPT OF HEARING
ON OBJECTIONS TO CLAIMS

Appearances:

For the Trustee: Craig, Weller & Laugharn by
C. E. H. McDonnell, Esq.

For Claimant J. J. McDonnell: Robert I. Kronick,
Esq.

For Claimant Edmund G. Egan: James A. Gil-
bert, Esq. [1*]

Los Angeles, California

Wednesday, January 11, 1950

* * *

J. J. McDONELL

Called as a witness, being first duly sworn, testified as
follows:

The Referee : Your name is J. J. McDonell?

* Page numbering appearing at foot of page of original certified
Reporter's Transcript.

(Testimony of J. J. McDonell.)

The Witness: That is right.

The Referee: Now, let's see what you have here, Mr. McDonell. You have two claims, have you?

Mr. Kronick: If the Court please, may I make a short statement here which may shorten the matter?

The Referee: All right.

Mr. Kronick: In connection with Mr. McDonell's claim and Mr. Egan's claim, we have several witnesses here and they are both in the same position and we are willing to stipulate that the testimony of these witnesses, with the exception of course of the amounts that are owing to each [34] individual, may be taken on account of each claim.

The Referee: So stipulated, Mr. McDonnell?

Mr. McDonnell: I will so stipulate, your Honor.

The Referee: All right, let me find out first what Mr. McDonnell claims here.

Well, gentlemen, you ought not to file claims in bankruptcy like this. This claim is \$16,064.00, wages earned, due and owing. Is that all the claim says?

Mr. Kronick: That is all.

The Referee: And what is the next one——

Mr. Kronick: He alleges a preferred claim of \$600.00.

The Referee: Wages earned within 3 months before the date of the commencement of these proceedings.

Well, gentlemen, when you file a claim in bankruptcy, please be good enough to give the Court and the Trustee some information about the transaction. After all now, \$16,000.00 is still a sizeable sum of

(Testimony of J. J. McDonell.)

money. You know you would be demurred out of court over in the Supreme Court on a thing like this in 10 minutes.

Mr. Kronick: In defense of myself, I didn't prepare this.

The Referee: I don't care who prepared it. After all, I'm not going to go ahead on the trial of a thing here unless I have something in front of me. Do you know anything about this, Mr. McDonnell, what the details are on these two Claims? [35]

Mr. McDonnell: It was necessary to make some investigation. We do have some rough idea of the details and the manner in which the claim is supposed to have arisen.

The Referee: Well, let me see what Mr. Egan has got here.

Mr. Gilbert: Please the Court, we are in much the same position. However, in defense of our position I must say that in answer to inquiry from the Trustee an itemized statement of the claim was——although not filed with the Court——was given to the Trustee for his information, relating to specific dates, periods, and specific amounts claimed; and I gave that personally to Mr. Harpole of your office, Mr. McDonnell.

Mr. McDonnell: That is right.

Mr. Gilbert: And I ask leave of the Court to amend our proof of claim if that is necessary at this time.

The Referee: Oh, there is no question about it. I'm not going to allow a claim in the shape in which

(Testimony of J. J. McDonell.)

these claims are. You are going to have to give us further information about them.

Well, now, what information, Mr. McDonnell, do you have on Mr. McDonell?

Mr. Kronick: I think in defense of myself also, your Honor, I might say an associate in my office has discussed this at great length with Mr. McDonnell and with the Trustee.

The Referee: Have you anything in writing from these [36] people, Mr. McDonnell?

Mr. McDonnell: I believe letters have been written to the Trustee.

The Referee: Well, let's see what you got. We have got to save time.

Mr. McDonnell: Your Honor, I have notes made off the letters but I don't have the original letters here. I don't have that file.

The Referee: All right. Going back to the claim of Mr. McDonell, I understand that the two claims are one except that a portion of the amount is set forth in the separate claim for the purpose of expressing a claim of priority; is that right?

Mr. Kronick: Correct, your Honor.

The Referee: All right, I will hear from you. You tell me what this is all about.

Mr. Kronick: Very well. I think I can shorten it.

Q. Mr. McDonell, when did you—

The Referee: No, I want you to make a statement here of what this is before we go ahead.

Mr. Kronick: Very well, your Honor. Mr. McDonell had been engaged in the business, in the rug busi-

(Testimony of J. J. McDonell.)

ness, for many years, and was employed with a large firm here before he went over to Hacker-Byrnes. At that time he was earning approximately \$15,000.00 a year. He was employed in the latter part of 1947 by Hacker-Byrnes as the manager and salesmanager and [37] in complete charge of their rug department. At that time he was given, under an oral agreement with Mr. Hacker, a guarantee of a salary of \$15,000.00 a year, plus 50 per cent of the profit derived from the rug department only.

That continued until Mr. Hacker bought out Mr. Byrnes and became the complete owner of the business. At that time he called together several executives and made some of them or several of his executive employees, not only made them directors of the company but gave them offices of vice-president, etc., and the new agreement was that Mr. McDonell was to receive a guarantee of \$20,000.00 a year plus a share of the gross profits.

We are not making any claim for that. Each of the executive officers were given a definite percentage, but there was no profit and we are standing on the salary. Against that he was paid \$150.00 a week. He was employed to the 18th day of February, 1949; and that is my reason for filing the preferred claim for \$600.00, which is the limit. We figured it was about three weeks within the three-months period.

The Referee: But he did get his \$150.00 a week up to February 18, 1949?

Mr. Kronick: Yes. Sometimes he didn't get it all.

The Referee: Well, you are going to have the

(Testimony of J. J. McDonell.)

laboring oar there, sir, trying to get any priority for anything over [38] \$150.00 a week. The priority statute is for those who are dependent upon their wages for their livelihood.

Mr. Kronick: This man is.

The Referee: \$150.00 a week ought to take care of a man in pretty good shape. Anything over and above that I think is just something in excess.

However, I will leave that aside for the moment. I am just pointing out your difficulty here.

Mr. Kronick: I have checked some of the authorities. That statute is very liberally construed. It is up to the Court.

The Referee: I have a whole stack of creditors here whose claims are just, too. So let's get down to some realities.

Mr. Kronick: Well, this claim is the difference between what he was paid and the guarantee.

The Referee: All right, go ahead and prove your claim. I will take a recess first. It may take you some time.

(Recess)

The Referee: All right, let's go forward with the McDonell claim.

Direct Examination

By Mr. Kronick:

Q. Mr. McDonell, when did you become employed by Hacker-Byrnes Corporation?

A. The first week in September of 1947. [39]

(Testimony of J. J. McDonell.)

Q. And what was the financial basis of your employment?

A. A guarantee of \$15,000.00 a year and a share of the profits, 50 per cent of the profits of the rug department. That \$15,000.00 was a guaranteed amount and any profits that I would derive would have to be above the \$15,000.00, on a split.

Q. In other words, the \$15,000.00 would be taken off of the profits of the rug department before you would share in 50 per cent of the profits?

The Referee: That isn't what he said.

The Witness: It was a guaranteed amount of \$15,000.00 regardless of whether there was any profit or not.

The Referee: But supposing the profits were \$30,000.00 in the rug department, how much would you get?

The Witness: Then I would get \$15,000.00.

The Referee: I see. All right. So he was to have 50 per cent of the profits of the rug department, with a guarantee that the 50 per cent of the profits would not be less than \$15,000.00?

Mr. Kronick: No, that is not what he said.

The Referee: That is what he said. That is what the man said.

Q. By Mr. Kronick: Who did you have a conversation with when you became employed there?

A. Mr. Hacker.

Q. What was that conversation? [40]

A. He gave me a guarantee of \$15,000.00. When I went there Mr. Hacker didn't have very much of a

(Testimony of J. J. McDonell.)

rug department. He asked me for a year or two prior to that to come and work for him; and at the time I went to work for him he didn't have any of the major carpet lines, and I felt, and I told him so at the time, that it wasn't going to be a deal where we could build up a business overnight, it was going to take a little time to build it; and he told me at that time he didn't expect to make any money for maybe a year or two, that he was willing to give me a guarantee of \$15,000.00 a year and a share of the profits of 50 per cent. Whatever the \$15,000.00 was, that was a guaranteed amount, whether we made any money in the rug department or not, and I didn't expect to make any the first year.

Q. In other words, the rug department was starting from scratch?

A. He had a small rug department.

Q. Where were you employed at that time?

A. Walton N. Moore Rug Company.

Q. About how long have you been in the rug business? About how long have you been engaged in the rug business?

A. 25 years. I was 11 years with Walton N. Moore Rug Company.

Q. And have you got your income tax return to show what you earned at Walton N. Moore's for the half year before you went to Hacker-Byrnes? [41]

A. I have the return for 1946 and that was \$11,148.56, plus a car and expenses.

Q. What year was that?

A. That was in 1946.

(Testimony of J. J. McDonell.)

Q. What did you earn in 1947 for the half year?

A. I left Walton N. Moore about the middle of July, and up until that time they paid me \$7652.00 for the first 6½ months.

Q. And then in addition to that did you receive your travelling expenses?

A. Travelling expenses and car expense, that is right.

Q. Now, for the year 194— from the time you went to work until the end of 1947, have you computed what your earnings would be on the basis of \$15,000.00 a year? A. \$4615.00.

Q. And how much were you paid?

A. \$2400.00.

Q. And that leaves a balance of how much?

A. \$2215.00

Q. Which is owing to you for 1947?

A. Which is owing to me for 1947.

Q. All right. Now, was this agreement about your guaranteed salary ever changed?

A. At the time Mr. Hacker bought out Mr. Byrnes.

Q. When was that?

A. That was in the latter part of October of 1947. Mr. [42] Hacker bought out Mr. Byrnes and at that time he asked me if the profit-sharing, that is the 50 per cent of the profits of the rug department, if I would be willing to forego that, and on that basis he guaranteed me \$20,000.00 a year. However, there was to be a share of the profits if there was profits made over and above the \$20,000 a year, but in lieu of the

(Testimony of J. J. McDonell.)

share of the profits of the rug department and my guarantee of \$15,000.00 he increased the salary to \$20,000.00 a year guaranteed, and I wasn't only to participate in the profits of the rug department but of the business as a whole if there was any profits above—I still had a guarantee of \$20,000.00

Q. And when did that—do you recollect when the \$20,000.00 guaranteed salary commenced? When did you figure it from?

A. I figured it from the first of 1947. However, the first meeting we had was on November 5, 1947, in which the preliminaries were discussed, and on November 30th of the same year we had another meeting at which time Mr. Egan and Mr. Savage and all the men who were made directors of the company and were to participate in the profits of the company above their guaranteed salaries were at the meeting. That was on November 30th. However, on January 15, 1947, there was another meeting—

The Referee: Wait a minute now. You have just testified about a meeting on November 30, 1947. [43]

A. 1948; I'm sorry. On January 15, 1948, there was another meeting at which this was all confirmed.

Q. By Mr. Kronick: Who was present at that meeting?

A. Mr. Egan, Mr. Shuler, Mr. Mauger who was controller of the company, Mr. Hacker, Mr. Savage. I believe that is all. I don't believe Mr. Hacker's attorney, Mr. Gold, was there at that time.

Q. Do you recall—I just want to get the conversation, your Honor.

Testimony of J. J. McDonell.)

The Referee: Isn't there any scrap of paper on his at all, counsel?

Mr. Kronick: There were some notes made——

The Referee: I mean anything signed by anybody, any directors' minutes or anything like that?

Mr. Kronick: There was supposed to be minutes of this meeting and we have asked for them and they say they are not available, that they can't find any. Now, we have Mr. Mauger, who is secretary of the company who made notes and handed them to Mr. Gold, the attorney, of this meeting on January 15, 1948, stating all these facts, and we have a witness who was present——we have a witness here who was present.

The Referee: You have no documentary evidence at all?

Mr. Kronick: No, we have asked for the minutes and they say they haven't got them.

The Referee: Did you serve a notice to produce on the [44] Trustee?

Mr. Kronick: No, we haven't.

Mr. McDonnell: Who was asked, Mr. Kronick?

Mr. Kronick: Mr. Benjamin asked you if there were minutes and you said no.

Mr. McDonnell: Not to my knowledge, Mr. Kronick.

Mr. Gilbert: Counsel, I made that demand on the assignee for the benefit of creditors for that information, as well. I was informed that there were no such minutes.

(Testimony of J. J. McDonell.)

The Referee: You were informed that there were such minutes?

Mr. Gilbert: I was informed, your Honor, that there were no such minutes, and as a matter of fact——

The Referee: All right, let's handle this in a legal manner. I want to know first whether or not there is anything in writing on this very difficult question here.

Mr. Kronick: We should say there should be, or they have either evaporated or are not available.

The Referee: Were there minute books, Mr. McDonnell?

Mr. McDonnell: There certainly were, your Honor.

Mr. Kronick: Are they here?

Mr. McDonnell: No, they are not here. I wasn't aware there had been a directors' meeting on these wages.

The Referee: All right, go ahead with this meeting.

Q. By Mr. Kronick: Now, what was said at that time by Mr. Hacker as to what your salary would be that year? [45]

A. \$20,000.00 a year guaranteed.

Q. And were you also to get——

A. And I was to participate in the profits to this extent——

Q. Profits in what?

A. Of the whole organization. If there were any profits made——Mr. Hacker was to draw a salary of

(Testimony of J. J. McDonell.)

\$25,000.00. He was to get 50 per cent of the profits. The other 50 per cent of the profits was supposed to be split up between 4 employees. I was to get 30 of the 50 per cent which was left, which would be 15; Mr. Egan was supposed to get one-third of the balance, Mr. Shuler was supposed to get one-third of the balance, and Mr. Savage was supposed to get one-third of the balance; but that was irrespective of the salary feature. We were all guaranteed a flat salary.

The Referee: At this point, Mr. McDonell, I wish you would give me some information on what you mean by a guaranteed salary. What do you mean by that?

The Witness: I was to get \$20,000.00 a year.

The Referee: Well, why do you say "guaranteed"?

The Witness: Well, because Mr. Hacker guaranteed that we would get it.

The Referee: I know, but if he is going to pay you salary of \$20,000.00 a year, that is it. However, if you are to get a certain percentage of something then he might guarantee you that your amount would not be less than a certain [46] amount, but if he is going to pay you a salary, that is it. Now, why do you insist on repeating about a guaranteed salary?

The Witness: It was a guaranteed salary. I expected to get \$20,000.00 minimum. If there was any money made in the corporation I was to get more than that.

The Referee: All right, go ahead, Mr. Kronick.

Q. (By Mr. Kronick): Were you to get that \$20,-

(Testimony of J. J. McDonell.)

000.00 whether the company made any profit or not?

A. Mr. Hacker understood when I went with him we talked it over thoroughly, that I didn't feel I could build up the rug department in 2 or 3 months and he told me definitely if it took a year or two it was perfectly okay.

Q. All right. Now, you computed your salary at \$20,000.00 for 1948?

A. That is right.

Q. And what did you receive on account of that salary?

A. I actually drew \$6,900.00

Q. That left a balance of how much?

A. That left a balance of \$13,100.00.

Q. All right. Now, when did you terminate your employment with Hacker-Byrnes?

A. On February 18th of 1949.

Q. Were you still on the same basis?

A. I presume so. There was nothing ever said to me to the contrary. [47]

The Referee: Oh, now, wait a minute. Counsel, we can't be satisfied with just a presumption.

Mr. Kronick: Well, I didn't get through, Your Honor.

The Referee: All right, go ahead.

Q. (By Mr. Kronick): After this meeting on January 15, 1948, were there any conversations or any oral agreements made changing your salary or any percentage—

A. Not anything said at any time. Even when Mr. Hacker took in 2 or 3 new partners there was

(Testimony of J. J. McDonell.)

still never any mention as far as my deal was concerned.

Q. Now, as far as you know, at this meeting on January 15th were notes taken of the statements that were made by Mr. Hacker at that time?

A. Mr. Mauger, who was controller of the company, took notes and typed them up the next day.

Q. Now, for the year 1949 until the date that you left the employ, how much did you—what sum did you compute as the amount owing to you under this arrangement?

A. \$2,307.69, of which—

The Referee: How much?

The Witness: \$2,307.69.

The Referee: Yes.

The Witness: And I drew \$950.00, which left a balance of \$1,352.69.

Q. (By Mr. Kronick): And did you total that?

A. The total of the thing for 1947 and 1948 and 1949 [48] is \$16,667.89.

Mr. Kronick: That is all at this time.

The Referee: Cross examine.

Cross Examination

By Mr. McDonnell:

Q. Now, to begin with, was your position in the Hacker-Byrnes Corporation when you first went to work for them?

A. I was manager of the rug department.

Q. I see; and at that time were you made an officer of the company, an officer or director of the company?

(Testimony of J. J. McDonell.)

A. Not at that time, not until later when Mr. Byrnes was out of the corporation.

Q. Now, when you first went to work you say they had a small rug department?

A. That is right.

Q. And did you have anybody selling for you in the rug department?

A. Yes, I had Bob Shuler.

Q. Was he the only one at that time?

A. He was the only one at that time.

Q. And do I understand that as the months and the years went on you built the rug department up increased its size?

A. The first month or the first few months—as I say, Mr. Hacker didn't have any of the major lines of carpet or [49] anything. We didn't have anything much to sell. By the end of that year—I started in September. By the end of that year we had secured one contract on which there was about \$9,000.00 profit made. That was the second year I was there. After Mr. Byrnes got out and after the first of the year finances were such, getting tighter all the time, that it made it almost impossible to get merchandise.

Q. Well, now, all through the latter part of 1947 and the early part of 1948 did anybody but Mr. Shuler work for you in the rug department?

A. Yes, his brother worked for us.

Q. Anybody else that worked under you?

A. Mr. Hacker brought in two or three boys in

(Testimony of J. J. McDonell.)

he hard surface division that worked out of our
Vilshire store out there.

Q. And you had charge of all these people?

A. Yes.

Q. Now, you say you became an officer and direc-
tor at one time? A. Yes.

Q. When was that?

A. At the November 30th meeting, 1947.

Q. And what was the position you assumed?

A. Well, Mr. Hacker made me Vice-President
and General Manager.

Q. And did you continue as Vice-President and
General [50] Manager until you terminated your
employment with Hacker-Brynes Corporation?

A. No. Some time late in—or about the middle
of the year, 1949, I resigned. Q. Or was it 1948?

A. 1948. I resigned as an officer of the company.

Q. Did you continue as general manager?

A. Yes.

Q. And did you continue as general manager up
until the end? A. Yes. I would say so.

Q. I see; and all that time you had people under
your direction and employ? A. Yes, sir.

Q. Now, you went to work for the Hacker-
Brynes Corporation and you say you were guaran-
teed a salary of \$10,000.00 a year?

A. No, I said \$15,000.00.

Q. 15. I'm sorry. And then as I understand your
testimony that was not dependent upon any income
that the rug department might derive from the—
that the corporation might derive from the rug de-
partment? A. Positively.

(Testimony of J. J. McDonell.)

Q. Was it in any way related to the income the company might make in general,—that is, exclusive of or in addition to whatever the rug department made? [51]

A. Any bonus that I would have received would have been in——

Q. I know, but aside from the bonus or a share of the profits, I'm talking about the \$15,000.00 that you say was guaranteed to you.

A. That is right.

Q. Was that in any way related to any profit the corporation might or was supposed of you hoped it would make?

A. I would presume that—whether it was the rug department or the appliance department or whatever department made the money I would still get it, because it was Mr. Hacker's business.

Q. Well, was it your understanding you were to get a guarantee of \$15,000.00 if he took a loss?

A. I had a definite guarantee. I wasn't going to quit a job that was paying me \$7500.00 in 6 months on a gamble with Mr. Hacker.

Q. You were promised this rain or shine \$15,000.00 and other inducements besides?

A. That is right.

Q. About when in 1947 was that agreement made?

A. In September, 1947.

Q. And when did you begin negotiations with the Hacker-Byrnes Corporation for that contract?

A. Mr. Hacker came up to San Francisco when I went up to resign. [52]

Testimony of J. J. McDonell.)

Q. That was in September of 1947?

A. August of 1947.

Q. And you and he discussed it at that time in San Francisco? A. Yes.

Q. Was there a written contract for this \$15,000.00? A. No.

Q. How long were you to get the \$15,000.00? What was the understanding on that? How long was that contract to run, just one year or longer?

A. There was no specified time on it.

Q. Was there any provision for you to be discharged in less than a year?

A. No, because I presumed—I had known Mr. Hacker for a good many years; in fact, before Mr. Byrnes ever got in his corporation Mr. Hacker wanted me to come with him. I had known him for about 20 years.

Q. Now, this \$15,000.00 contract was altered in the latter part of 1947 at this directors' meeting?

A. That is right.

Q. And you were then put on a guarantee of \$20,000.00? A. That is right.

Q. Now, was that \$20,000.00 guarantee in any way related to the profit made in general by the Hacker-Byrnes Corporation? A. No, sir. [53]

Q. You were to get the \$20,000.00 whether the Hacker-Byrnes Corporation was a profitable operation or not? A. That is right.

Q. Of course, the profit end of it was connected to whatever profit the rug department would make?

A. No, the profit end of it on the new deal was

(Testimony of J. J. McDonell.)

dependent upon the business as a whole, not only the rug department only.

Q. This new deal was to be drawn from the profits made by the business as a whole as well as the rug department?

A. Outside of the guarantee.

Q. And how were these profits to be figured, before or after taxes? These profits which you in prospect at least were to share, how were they to be computed?

A. I would presume after taxes.

Q. Was there any discussion about it?

A. No, there was no discussion about it at all.

Q. At any time after you came into the employment of Hacker-Byrnes to your knowledge was the rug department profitable?

A. Yes, we had 2 or 3 profitable months.

Q. You were acquainted with the operation of the rest of the business, were you? A. Yes.

Q. And was the entire operation profitable at any time?

A. It was for the first 6 or 7 months I was there, I [54] would say. In fact, in fact, I would say that some of the things that happened in the latter part of 1948, if they hadn't happened, I think the business was a going business and could have been a successful business.

Q. Now, when you went to work for Mr. Hacker in the Hacker-Byrnes Corporation in 1947, how much did you draw on the first pay check you drew?

A. \$150.00.

Testimony of J. J. McDonell.)

Q. And that represented what pay period?

A. That was one week.

Q. \$150.00 is not \$15,000.00 a year, is it?

A. That is right.

Q. Well, what was your understanding as to how his \$15,000.00 was to be paid to you?

A. The \$15,000.00 was to be paid to me at the end of the year. In fact, I set my salary at \$150.00 a week. Mr. Hacker didn't set my salary at \$150.00 a week, and if I had thought for a minute there wasn't going to be \$15,000.00 for me at the end of the year I would have set it at more than \$150.00 a week.

Q. And you never at any time then requested that you be paid a weekly division of \$15,000.00 a year?

A. No.

Q. The understanding was you were to be paid lump sum at the end of the year?

A. That is right. [55]

Q. And that was not dependent upon the company making a profit?

A. That is right.

Q. Now, as to the agreement made in January of 1948, how much were you to be paid weekly then?

A. The same thing.

Q. \$150.00 a week?

A. Yes.

Q. In May of 1948 did you take a cut in salary?

A. I took a cut in salary as far as the books were concerned.

Q. You were cut——

A. And Mr. Hacker gave me some extra money to pay the difference.

Q. You were cut to what?

(Testimony of J. J. McDonell.)

A. To \$100.00 a week.

Q. And he made up the difference out of his own pocket every week? A. Yes.

Q. Did he make it up every week?

A. He is about 4 payments short.

The Referee: Let me get this clear in the record now. There was a general agreement among all the people on salary that there was to be a cut and you agreed to that?

The Witness: I wasn't in the agreement. I wasn't at the meeting. I didn't attend the meeting. [56]

The Referee: But on the books it showed you were taking a cut?

The Witness: That is right.

The Referee: And Mr. Hacker slipped you money on the side?

The Witness: That is right.

The Referee: All right. Go ahead.

Q. (By Mr. McDonnell): Mr. McDonell, did you pay income tax on the \$50.00 a week on the side?

A. I did. I can show it on the income tax blank right now.

The Referee: Tell me how it is you received only \$6900.00 in 1948. You said you got \$150.00 a week. Have you got the details of the \$6900.00?

The Witness: Here is the full detail of every pay check I received. It is by quarters here.

The Referee: Just a minute now.

The Witness: It shows \$6100.00.

The Referee: Well, you say that in the first quarter of 1948 you received \$1950.00 in checks.

(Testimony of J. J. McDonell.)

The Witness: That is right.

The Referee: Well, that would be 13 weeks, wouldn't it, at \$150.00 a week? The second quarter you got \$1500.00. Now, what were your checks for during the second quarter? How much was each individual check?

The Witness: I have them listed there, Your Honor. [57]

The Referee: Where?

The Witness: I guess not. I guess they are just listed by quarters.

The Referee: Well, can you explain that?

The Witness: Yes, because I believe it was in May when the rest of them took a cut my check was cut from \$150.00 to \$100.00.

The Referee: But where do you show here the money you got on the side?

The Witness: I added it on to my——

The Referee: What?

The Witness: Here is \$800.00 of it right here, I got extra from Mr. Hacker, which makes the \$6900.00.

The Referee: All right, in the whole year you got \$800.00, but it still doesn't explain it. 52 weeks at \$150.00 a week is \$7800.00.

The Witness: That is right.

The Referee: All right. Now, how do you account for the fact that you only got \$6900.00?

The Witness: Well, I guess I was just some short. I thought it was——

(Testimony of J. J. McDonell.)

The Referee: Well, now, listen, mister, you are here to give us information.

The Witness: Well, this is what I actually got.

The Referee: All right, will you tell us why you only got \$6900.00? How did that happen? [58]

The Witness: Well, Mr. Hacker was probably a little short and didn't make up the balance for me.

The Referee: Well then, you didn't get \$150.00 a week, is that right?

The Witness: No, he gave it to me a hundred at a time or two hundred at a time, whenever he happened to have it.

The Referee: Go ahead, Mr. McDonnell.

Q. (By Mr. McDonnell): Can you explain to us, Mr. McDonell, why it was that you got the difference or at least most of the difference in your salary cut made up when others who testified here today evidently did not? Was there some arrangement about that with Mr. Hacker? A. No.

Q. He just came around gratuitously and gave you the difference?

A. Well, I think that Mr. Hacker felt that I had probably made more money than anybody else in the organization prior to the time of coming there and if I was only getting that amount of money it was quite a cut to me.

Q. Did he say anything to you about making it up? A. Definitely. He said——

Q. When was that that he discussed that with you?

Q. Well, whenever he happened to come out to

(Testimony of J. J. McDonell.)

he store he might bring a hundred dollars or two hundred, and it probably happened 5 or 6 times in the year.

Q. I mean did you have a discussion with Mr. Hacker about [59] making up the difference?

A. Well, I talked to Mr. Hacker I believe it was in September of this last year when Maury Sommers and Mark Byar and Dave Kaplan, who were the other partners in the business—at that time I had no other job offered to me and I was going to leave, and Maury Sommers assured me at that time that they were going to put 75 or 100 thousand dollars in the business and that we could still build up a good business, and that was the only reason I stayed.

Q. Was that the first time you had gotten the difference between your \$100.00 that was showing on the payroll check and the \$150.00 that was your regular salary?

A. No, sir.

Q. Mr. Hacker just gave you the difference without ever saying why he was doing it or anything?

A. He told me he was going to make it up to me, whatever I was short.

Q. Did he ever make it up to anybody else?

A. Not to my knowledge.

Q. You say you were guaranteed \$15,000.00 in the latter part of 1947?

A. Yes.

Q. And when was the difference between your weekly drawings of \$150.00 and the \$15,000.00 to come to you?

A. At the end of the year.

Q. Would that have been at the end of a year of employment? [60]

(Testimony of J. J. McDonell.)

A. Well, that would be in September the next year.

Q. And was the same understanding had when your salary was increased to \$20,000.00?

A. I would say so, yes.

Q. In other words, you were to receive the difference in December of 1948? A. Yes.

Q. Well, were you aware that Hacker-Byrnes was having financial difficulties at any time in 1948?

A. I was the tail end of the year, yes.

Q. Did you go in at any time and ask for the difference that was due you or would be due you at the end of the year, between \$150.00 a week and the \$20,000.00?

A. Not until September, 1948.

Q. You went in and asked for it then?

A. Yes.

Q. Did you get it? A. No.

Q. That was when Mark Byar and the rest came in?

A. Yes. Well, they had been in the corporation before.

Q. That was in September, 1948, you made that demand? A. Yes.

Q. And where did you make it?

A. The Broadway store.

Q. Who did you make it on? [61]

A. Mr. Hacker.

Q. Anybody else present when you made the demand? A. No.

Q. And he didn't pay you anything at that time?

Testimony of J. J. McDonell.)

A. No.

Q. What explanation did he give you then?

A. Well, Mr. Hacker figured right up to the last e was going to be able to work out of this situation.

Q. But what did he say on that occasion, he ouldn't pay you or what?

A. He did, but he would pay me "as soon as we et on our feet."

Q. And you agreed to go ahead on that basis?

A. That is right.

Q. Did you ever receive any bonus, Mr. McDonell, other than the sums you have told us about?

A. No.

Q. Any extra vacation pay or anything of that ature?

A. No. I received \$450.00 for a trip I made to ew York from Mr. Hacker.

Q. That was expenses, was it not? A. Yes.

Q. How about in December, Christmas of 1947, id you get a bonus? A. No, no bonus.

Q. No bonus was paid you? [63]

A. No, sir.

Mr. McDonnell: I think that is all the questions have, Your Honor.

Q. (By the Referee): You have testified that fter the \$20,000.00 arrangement went into effect ou were to get 30 per cent of 50 per cent of the enre profits of the firm; is that correct?

A. That is correct.

Q. Well, did you ever hear about any profit-arining plans for the employees as a whole?

(Testimony of J. J. McDonell.)

A. No, the only profit-sharing plans I heard about was the one I mentioned.

Q. Well, that was limited to 3 or 4 of the executives, wasn't it? A. That is right.

Q. Then you never heard of anything like that that these other people testified about?

A. No, that came before my time that I was there.

Q. No, not according to their testimony. I'm not talking about a 3 per cent bonus. I'm talking about the profit-sharing that was to be based upon the individual sales, for instance, individual salesmen. Have you ever heard anything about that?

A. I didn't know anything about that.

The Referee: Any further examination, counsel?

Mr. Kronick: Yes. [63]

Redirect Examination

By Mr. Kronick:

Q. These figures you have been showing to the Court, where did you get those figures?

A. They are from the Hacker-Byrnes payroll checks, the dates of the checks and amount of the check and everything else.

Q. That is an exact record from the Hacker-Byrnes books? A. That is right.

Q. Now, did you at any time have any financial interest in the Hacker-Byrnes Corporation?

A. No. Mr. Hacker at the time he bought out Mr. Byrnes was a little bit short and I think some of the employees gave him a thousand or two thousand.

Testimony of J. J. McDonell.)

and dollars and so on. I gave him two thousand dollars but it was paid back to me.

Q. It was a loan? A. Yes.

Q. Several other employees did the same thing?

A. Yes.

Q. Did you at any time hold any stock in the Hacker-Byrnes Corporation? A. No, sir.

Q. When were you—when you were made a director and officer, how was that brought to your attention? A. He just told me.

Q. When you were made a director and officer of the corporation, did Mr. Hacker say you were an officer and director and that was all there was to it?

A. That is right. Mr. Hacker was the sole owner of the corporation then.

Q. And for several months then—well, you say after the middle, about the middle of 1948, you were no longer an officer or director?

A. That is right. I resigned.

Q. And was it part of your employment to make sales of carpet also? A. Yes.

Q. You were what might be designated a traveling salesman?

A. Not a traveling salesman. We made some calls out of the store but not as a traveling salesman.

Q. You were given an auto expense in addition to your salary?

A. Yes, a hundred dollars a month expenses for my car and whatever incidental expenses I had.

Mr. Kronick: That is all.

(Testimony of J. J. McDonell.)

Recross Examination

By Mr. McDonnell:

Q. Mr. McDonell, you were—or were you conversant [65] with the manner in which the Hacker-Byrnes books were set up while you were there as general manager? A. No.

Q. Do you know whether any reserve was to be set up or was set up to care for this salary of first \$15,000.00 and later \$20,000.00 which you were to be paid?

A. No, to my knowledge there wasn't any set up.

Mr. McDonnell: That is all the questions I have.

Q. (By the Referee): Did they have any directors' meetings of this corporation?

A. Mr. Hacker was a director.

Q. No, answer my question. Did you have any directors' meetings——

A. We didn't have any meetings from the time we were appointed directors until Mr. Hacker sold out to Mr. Sommers and the other boys, and then we just had a request to resign, that is all, as directors of the corporation.

Q. And that was the occasion for resigning, when other people came into the business; is that right?

A. That is right.

The Referee: All right. Any other questions?

Mr. Kronick: That is all.

The Referee: All right, you may step down. Now let's have Mr. Egan.

EDMUND G. EGAN,

[66]

called as a witness, being first duly sworn, testified as follows:

The Referee: And your name is what?

The Witness: Edmund G. Egan.

The Referee: All right, go ahead.

Mr. Gilbert: May it please the Court, our testimony would be much the same as that given by Mr. McDonell as to all the preliminaries.

At or about November of 1947 Mr. Egan was employed by the corporation. He had been employed, he had been an employee for a number of years, and at that time he was a party to these directors' meetings or general meetings of the executives, at which time the matter of their salaries and the matter of a share of the profits of the corporation were discussed, and he and these other gentlemen were made directors and officers of the corporation.

Direct Examination

by Mr. Gilbert:

Q. Mr. Egan, calling your attention to the first meeting in November of 1947, who was present at that particular meeting?

A. There was a—Mr. Hacker was present, Mr. Muhler, Mr. McDonell, Mr. Mauger, and Mr. Savage.

Q. Will you tell the Court briefly what the subject matter discussed at that meeting was as it affects our claim and the claim of Mr. McDonell? [67]

A. Yes. This was right after Mr. Byrnes was bought out with the help of all of us, and Mr. Hacker said that now we could sell, that we had gotten rid of

(Testimony of Edmund G. Egan.)

a partner that was not—with the exception of financially interested in the corporation. He was just more or less a silent partner. Now we had 4 fellows that he could put in command that were workers and that he was more than happy to split the money that he was paying his former partner among the 4 fellows that he felt were the key men.

Q. And approximately how much was being paid to Mr. Byrnes at that time?

A. I think Mr. Byrnes had been getting \$50,000 a year.

Q. And that was not paid? A. Yes.

Q. Now, will you tell the Court what the agreement was at that time or what the plans were in regard to the various—the employment of the various men concerned?

A. Well, Mr. McDonald had come into the organization as the head courier man and he was getting paid that, primarily because he was able to bring in outside lines in order to get merchandise that we didn't have at the time.

Q. Well, will you tell the Court how much Mr. McDonald was to be paid under that agreement?

A. Mr. Hacker was to be paid \$25,000.00 a year. In fact, he took a cut. He figured he should take a cut. He ought to [HE] take a cut so that he could set up a house for these men that had—

Q. How much was Mr. McDonald supposed to get, to your recollection? A. \$25,000.00 a year.

Q. And how much were the other gentlemen to get?

Testimony of Edmund G. Egan.)

A. I was to get \$12,000.00 and Mr. Savage \$12,000.00 and Mr. Shuler was to get \$10,000.00.

Q. And what were the respective positions or particular types of work each of those gentlemen were performing at that time, or were to perform?

A. Mr. McDonell was to be general manager in charge of—how was it set up now? General Manager in charge of—well, now, he was general manager and head of all carpet sales. I was to be Vice-President in charge of contract sales. Mr. Shuler was Vice-President in charge of our Wilshire store; and Mr. Savage was Vice-President in charge of our Broadway store.

Mr. Gilbert: May it please the Court, we don't care to go into the matter of the profit-sharing except if the Court cares to on cross examination, because we are not making any claim for any share of the profits. We are making claim only for the difference between the amounts paid and the \$12,000.00 per year salary.

The Referee: All right, go ahead.

Q. (By Mr. Gilbert): Now, Mr. Egan, I believe there was [69] a subsequent meeting at or about November 30th of the same year. Will you tell the Court what was done at that meeting?

A. At that meeting—a preliminary discussion was made about the 5th of November and the formal agreement was drawn up towards the end of the month, of the same month, November, and a formal agreement was drawn up and minutes were taken of

(Testimony of Edmund G. Egan.)

this particular set-up of these salaries and the bonus arrangement of these different men.

Q. All right, now, at that meeting were directors appointed or selected, as a matter of fact, by Mr. Hacker? A. Yes.

Q. Who were the directors of the corporation?

A. Mr. McDonell—Mr. Hacker was President, of course; Mr. McDonell was——

Q. Just directors now.

A. Mr. McDonell was Vice-President and General Manager; I was Vice-President; and both Mr. Savage and Mr. Shuler were Vice-Presidents.

The Referee: Well, now, this gentleman says a formal agreement was drawn up. What do you mean by that?

The Witness: Well, I mean he took everything down in writing——

The Referee: Who did?

The Witness: Mr. Mauger.

The Referee: Did you ever see it? [70]

The Witness: Yes.

The Referee: You saw it?

The Witness: Yes.

The Referee: All right, go ahead.

Q. (By Mr. Gilbert): And at that time were the terms or conditions of employment, of the employment contract or agreement between the officers and the corporation, any different than those you have described in your statement regarding the earlier meeting?

A. No, sir, they were just about the same thing

Testimony of Edmund G. Egan.)

The only thing that was brought up at the second meeting that wasn't at the first meeting was the amounts and percentages of bonus, but the salaries were still as they were stipulated at the original meeting.

Q. Now, Mr. Egan, would you give the Court your—describe to the Court your particular claim, giving the periods, the time, on which the claim is based, and the various amounts owing to you, that is the amounts paid to you and the amounts owing to you.

A. Yes. Well, I base my claim, to go back to November 5th, on the basis——

Q. (By the Referee): Supposing you give us a little background on yourself first. How long were you with the company before that?

A. Well, I was with Mr. Hacker before the war.

Q. Well, how long continuously were you with Mr. Hacker [71] before November 5, 1948?

A. About 2 years, right after I came out of the army, sir.

Q. And what was your position then?

A. I came out of the army and I went to work as salesman.

Q. And how much money did you make?

A. I started in at \$75.00 a week.

Q. And how much did you make thereafter?

A. Well, I was gradually up until at the end there was making \$150.00.

Q. \$150.00 a week? A. Yes.

Q. That was about Nov. 5, 1947? A. Yes.

Q. You were then making \$150.00 a week?

(Testimony of Edmund G. Egan.)

A. I made \$150.00 a week from November 5th to May 13th of that year.

Q. You are starting at the wrong end of the year. What I'm interested in is what you did and what you made before this new deal went into effect. How much were you making?

A. Well, I think with my—I had a salary and bonus arrangement, a commission arrangement, at the time, and I believe there were months that I made \$100.00 or \$125.00 total.

Q. (By Mr. Gilbert): Per week or per month or what? [72] A. Per week.

Q. (By the Referee): All right. Now then, on November 5, 1947, a new deal came into effect whereby you were to make \$12,000.00 a year?

A. That is right.

Q. All right. Go ahead. How much do you figure you have coming?

A. Well, during that period from November 5th to May 13th, November 5, 1947 to May 13, 1948, I drew a salary of \$150.00 a week. Based on \$12,000.00 a year, which is \$230.77 per week, I had \$80.77 coming for that period.

Q. How much does it amount to?

Mr. Gilbert: Per week?

A. Per week, and that would be 28 weeks.

Mr. Gilbert: I believe you have a total there, Mr. Egan. I have \$1261.56, which is the figure I gave the Trustee.

A. Yes, that is correct; \$1261.56 is what I have coming for that period.

Testimony of Edmund G. Egan.)

Q. (By the Referee): All right, now what after that?

A. Then on May 13th I went back to a hundred a week, and from May 13th to October 21, 1948, I have difference coming between what I drew and what I had coming of \$130.27 for 13 weeks.

Q. And how much is that?

A. That amounts to \$3007.71. Is that right?

The Referee: All right. [73]

Mr. Gilbert: Making a total of \$4269.27.

Q. (By the Referee): When did you terminate your connection with the company?

A. October 21, 1948, sir.

Q. How did that come about?

A. At the time the new directors came into the corporation they decided at that time that they would eliminate bidding on any large construction work which I was in charge of and I felt that my services weren't really needed and I made other connections and moved.

Q. (By Mr. Gilbert): Now, Mr. Egan, being the Vice-President in charge of contract sales will you tell the Court what particular jobs the corporation did during your occupancy of that position and your working at that position?

A. Well, there was an awful lot of them.

Q. Well, give the Court some of the largest.

A. Well, possibly every large carpeting job that was done in the city was done by Mr. Hacker, namely, Harbachs, Prudential, General Petroleum, maybe 2 or 3 dozen schools, Burbank City Hall—a lot of them.

(Testimony of Edmund G. Egan.)

Q. Have you got any rough idea of the amounts of money involved in those contracts?

A. I have only got one real figure in mind. The last month of actual active bidding on work, out of a possible \$125,000.00 worth of work we bid on we sold \$80,000.00.

Q. (By the Referee): And how much profit was made on those [74] jobs?

A. Well, a lot of this work was done after I left, a lot of the work was done while I was there, and I would say they showed a net profit at least of 10 to 15 per cent.

Q. (By Mr. Gilbert): That is from 8 to 12 thousand for an \$80,000.00 job? A. Yes.

Q. At that time you were in charge of contract sales?

A. Bidding and securing contracts, yes.

Q. At \$12,000.00 a year? A. Yes.

Q. Now, Mr. Egan, there has been some uncertainty about the matter of the reduction of the salaries from \$150.00 a week in your case to \$100.00 a week, in May. Would you explain to the Court how that came about?

A. Well, I possibly was the one that recommended it, that everybody should take a cut to help the corporation out over a period of time when we needed the money to possibly pay other bills with.

Q. Was it your intention in recommending that that you were to receive any less on your basic salary, let us say—some people here have referred to it as a

(Testimony of Edmund G. Egan.)

guaranteed salary—when you took that particular cut?

A. No, that was just some immediate help to raise enough capital or lower our overhead enough so we could meet some bills that were pending at the time. We were doing such a [75] large amount of work we needed a lot of capital at certain times to be able to meet our material bills.

Q. Mr. Egan, have you at any time had any financial or pecuniary interest in the corporation other than that as an employee?

A. No, I never did own stock. At the time—there is something that hasn't come up—at the time this agreement was made as far as profit-sharing was concerned, Mr. Hacker stipulated that until—let me put it this way: that when and if the profits were to be split up by those percentages as we have set forth, as they were set forth, they were to be utilized or to be used in making us able to buy stock with that particular percentage of profit rather than taking it out in cash and bleeding the company.

Q. You had an option to purchase stock?

A. Yes. That percentage we were to get was to go towards purchasing stock.

Q. Now, Mr. McDonell, the claimant, has made some reference to the aid that he and you and some others gave Mr. Hacker in purchasing the shares or interest of Mr. Byrnes. Would you just say a word about that?

A. Well, naturally we were all very friendly with Mr. Hacker, we all still are,—in fact, I still work for

(Testimony of Edmund G. Egan.)

him—so that gives you the idea there; so when he came to us for help we hocked and borrowed everything we could to help him out because we knew and felt that without Mr. Byrnes [76] we could go ahead a lot faster; and we did help him out financially, not as much as we would like to.

Q. I believe you said that put \$50,000.00 profits back in the business; is that right? A. Yes.

Q. (By the Referee): Do I understand you to say you loaned Mr. Hacker some money? A. Yes.

Q. Did you get it back?

A. Yes, every penny of it.

The Referee: Go ahead, counsel.

Mr. Gilbert: Cross examine.

Cross Examination

By Mr. McDonnell:

Q. What was your understanding, Mr. Egan, as to when the difference between your weekly salary and this \$12,000.00 a year was to be made up?

A. I assumed that it would be at the end of each year.

Q. Well, was anything said about it outside of your assumption?

A. Yes, there was a definite statement made.

Q. When was it said and by whom?

A. It was said at the meeting.

Q. Which meeting?

A. November 25th or 30th or somewhere in there. [77]

Q. Is that the first or second meeting?

A. The second meeting.

(Testimony of Edmund G. Egan.)

Q. All right, go ahead.

A. And at the end of each year——

Q. Who said that?

A. Mr. Hacker; at the end of each year the salaries were to be made up and the profits figured and the percentages figured out to see what each one had coming.

Q. And I understand you left the employ of Hacker-Byrnes the latter part of October, 1948?

A. October 21, 1948.

Q. And you at that time had some monies coming, the difference between your weekly salary and \$12,000.00?

A. That is right.

Q. And did you make demand for that sum?

A. Yes, I did. I asked Mr. Hacker and he said, "You don't have to leave, but if you are leaving the first chance I have we will get together and figure out what we have coming, what you have coming, and give it to you."

Q. And did you ever go to see him again to try to get the money?

A. Yes, I did.

Q. When did you go the second time?

A. Oh, I would say a month or so later.

Q. That would be in November?

A. Some time. [78]

Q. 1948?

A. The latter part of November, I would say.

Q. And where did you see Mr. Hacker?

A. At 1240 South Broadway.

Q. And were anybody but you and Mr. Hacker present?

(Testimony of Edmund G. Egan.)

A. Oh, I think there was a couple of fellows hanging around but I wouldn't know——

Q. I mean in the immediate vicinity and overheard your conversation? A. No.

Q. And what took place when you went in and saw Mr. Hacker?

A. Nothing except that he——

Q. Well, what did you say and what did Mr. Hacker say?

A. I said, "Well, Al, let's get together here, what have I got coming, etc.," and he said, "Well, I haven't got time to figure it out now; I will figure it out one of these days and let you know."

Q. Did you see him again?

A. I didn't see him again. I called him and I was given the same story.

Q. Did you see him again after that?

A. Oh, yes, I used to see him every now and then.

Q. And did you get the same story?

A. I would have ordinarily filed a claim against the corporation long before I did except I was friendly with Mr. [79] Hacker, and I didn't file my claim until after he had resigned as President of Hacker-Byrnes Corporation.

Q. And then you filed it?

A. And then I filed it, yes.

Q. Have you ever received any payment from Mr. Hacker? I understand you are still in his employ? A. Yes.

Q. Have you ever received any payment on this

(Testimony of Edmund G. Egan.)

sum you claim is due and owing from Hacker-Byrnes Corporation? A. No.

Q. Now, I believe it was in November this agreement started? A. That is right.

Q. Before that time how much had you been making in salary—not in commissions, in salary?

A. \$100.00 a week.

Q. And how long had you been making \$100.00 a week? A. A year prior to that.

Q. And about how much had your commissions averaged in the year prior to that time, or had you gotten any commissions?

A. Yes, I had gotten commissions.

Q. How much had they averaged?

A. Well, that is kind of a tough question. I wouldn't remember that.

Q. Well, can you remember how much income tax you paid [80] for say 1946, or what the income reported was?

A. No, I wouldn't be able to answer that at this time.

Q. When did this agreement start, in 1947 or 1948? A. What agreement is that?

Q. This \$12,000.00.

A. It was to start November 5, 1947.

Q. And that is when you began to get your \$150.00 a week payment? A. Right.

Q. How much did you report in the way of income in 1947? A. Around \$7500.00, I think.

Q. And that covered commissions and the \$100.00 a week you had been getting up to November?

(Testimony of Edmund G. Egan.)

A. Yes, sir.

Q. Was the profit-sharing agreement in substance as Mr. McDonell, the claimant, has outlined it on the stand under this agreement that you began in November?

A. I believe so. Mr. Hacker was to get 50 per cent. The other per cent was to be divided among the 4 officers, and he was to get 30 per cent and the balance of 20 per cent was to be split between the 3 of us.

Q. You were to get one-third of 20 per cent?

A. That is right.

Q. Now, you say this was in the form of a formal agreement? [81]

A. Well, I said it was in the form of a formal agreement, and the fact is—I don't know what is formal and what isn't, but it was written up and typed and I saw a typewritten copy of the minutes of that meeting.

Q. Oh, you are referring to the minutes here when you say "formal agreement"? A. Yes.

Q. Did you ever sign any agreement?

Mr. Kronick: I think that calls for the conclusion of the witness.

The Referee: It is cross examination. Proceed.

Q. (By Mr. McDonnell): Did you ever sign a paper embodying the terms you have outlined here?

A. Did I ever sign one?

Q. Yes.

A. Well, I signed several of those minutes. Now, to say that I actually signed that specific one I wouldn't want to do.

(Testimony of Edmund G. Egan.)

Q. But aside from the minutes did you ever see any kind of paper containing or embodying these terms? A. I did.

Q. Apart from the minutes?

A. Apart from the minutes?

Q. Yes. A. No.

Q. And do I understand your testimony to be, Mr. Egan, [82] that this \$12,000.00 was to be in no way dependent upon the profit that Mr. Hacker made?

A. That was my salary just like—the salary was \$12,000.00 a year of which I was to draw \$150.00 a week towards it, of which the balance was to be made up at the end of the year.

Q. Why wasn't the entire amount to be apportioned on the 52-week basis and paid at that time?

A. Because we didn't want to bleed the corporation of all the cash, you see, in it. We were trying to build up a new business.

Q. And you were hopeful of being able to take it out of the business at the end of the year?

A. Yes, and we would have, too.

Q. But you weren't able to? A. No.

Q. You were in charge of contract sales?

A. Yes.

Q. Did you have anybody working for you, Mr. Egan? A. Yes.

Q. How many?

A. I had two estimators at one time and I think three at another.

Mr. McDonnell. That is all the questions, your Honor.

(Testimony of Edmund G. Egan.)

The Referee: All right, any further questions?

Mr. Gilbert: No questions. [83]

Q. (By the Referee:): Did you get any part of the \$50.00 cut? A. No, sir.

Q. Did you know before today that Mr. McDonell was getting his? A. No, sir, I didn't.

Q. You didn't know that? A. No, sir.

The Referee: All right, step down. Any other witnesses?

Mr. Kronick: Yes, I would like to call Mr. Mauger.

WILLIAM A. MAUGER,

called as a witness, being first duly sworn, testified as follows:

The Referee: And what is your name?

The Witness: William A. Mauger.

Direct Examination

By Mr. Kronick:

Q. What is your present occupation and profession, Mr. Mauger?

A. I am an office manager right now.

Q. And what business?

A. Sacred Records, Inc.

Q. Were you at any time ever employed by the Hacker-Byrnes Corporation?

A. Yes, I have been associated with Mr. Hacker since [84] 1937.

Q. And when did you terminate that association?

A. And we were apart for the two years during the war. We were also apart—I left because of Mr.

(Testimony of William A. Mauger.)

Byrnes. I came back in about—oh, when Mr. Byrnes got out I came back in.

Q. About when was that?

A. I think it was about May of 1947.

Q. Now, were you—did you have any financial interest in the company?

A. No, I did not.

Q. Were you ever made an officer of the company? A. Yes, I was.

Q. Which officer? A. Controller.

Q. Were you ever made secretary or treasurer, or was that what you term controller?

A. I think that is what it is. Mr. Hacker was rather lavish with his terms.

Q. Have you filed any claim against the Hacker-Byrnes Corporation? A. No, I have not.

Q. You have been sitting in the court room and you have heard certain testimony as to a meeting between Mr. Hacker and certain of his chief assistants in November of 1947. Were you present at that meeting? [85] A. I was.

Q. And did you take any notes at that time or at the meeting in January?

A. I took notes in the meeting in November.

Q. And what did you do with those notes afterwards?

A. I wrote them up, typed them up, and sent them to Leo Gold. That is the last I ever saw of them.

Q. Now, do you recall the conversations at that time with reference to salaries and percentages of profits that the various men were to get?

(Testimony of William A. Mauger.)

A. Yes. Mr. McDonell was to get—Mr. Hacker was to draw not more than \$25,000.00, Mr. McDonell was to draw \$20,000.00, Mr. Egan and Mr. Savage I believe were to get \$12,000.00, and Mr. Shuler was to get \$10,000.00.

Q. In addition to that were they to draw any portion of the profits of the company, or share any portion of the profits of the company?

A. Yes. Mr. Hacker said that the profits would be so big that we would just have to split them up, and Mr. McDonell was to get 50 per cent—Mr. Hacker was to get 50 per cent, and Mr. McDonell was to get 30 per cent of that 50. The balance was to be divided between the others.

Q. And are those the points you embodied in your notes you sent to Mr. Gold?

A. That is right, they are.

Q. And were you taking those as minutes of a [86] corporation?

A. Well, I just simply had them down on a piece of paper and then typed them and sent them to Leo Gold to fix them up as minutes of the corporation.

Q. And who was Mr. Leo Gold?

A. He was our attorney.

Q. He was attorney for Hacker-Byrnes at the time?

A. Yes.

Q. And at that time were these men also appointed officers and directors of the company?

A. They were.

Q. And do you recall the positions?

(Testimony of William A. Mauger.)

A. Well, I think it was substantially the way they gave it.

Q. And who made those appointments?

A. Mr. Hacker did.

Q. As you understood the conversations and the statements that were made there, would you say that these amounts of \$20,000.00, \$12,000.00 and \$10,000.00, were given as salaries irrespective of the profits of the company?

A. Yes, they were.

Mr. Kronick: That is all.

The Referee: Cross examine.

Cross Examination

By Mr. McDonnell:

Q. When did you leave the employ of Hacker-Byrnes [87] Corporation?

A. August 31, 1948.

Q. How much money did you draw immediately prior to leaving?

A. I drew \$125.00 until the cut and then I drew \$100.00.

Q. And were you in on this deal where you were to get a share of the profits?

A. No, when I asked Mr. Hacker about leaving the only question he asked me was how many weeks I had been taking that cut, and he restored it to me immediately.

Q. You mean he restored the entire sum to you?

A. Yes.

Q. Why did you sever your connection with the Hacker-Byrnes Corporation?

(Testimony of William A. Mauger.)

A. Well, I was controller and I wasn't satisfied with the way the thing was going.

Q. By that what do you mean?

A. Well, it was being run too fast and loose.

Q. Could you indicate a little more accurately what you mean?

A. Well, one of the men talked about there was no reserve being set up. There was nothing being done as far as I knew to make good any of the promises that had already been made.

Q. And that was the reason that you left? [88]

A. That is the reason that I left.

Q. Because there were no reserves being set up?

A. The money was coming in but it was going out faster than it was coming in, and I just didn't want to continue.

Q. You felt that the corporation was in for a rough financial time; is that correct?

A. I saw it coming and got out.

Q. Did you ever make that remark to Mr. McDonell or Mr. Egan, that you thought that there was no reserve to cover their salary?

A. No, I wouldn't testify to that.

Q. You never discussed that fact with either Mr. Egan or Mr. McDonell?

A. I wouldn't say that I did, no.

Q. Would you say that you did not?

A. I say that I wouldn't say that I did discuss it with them. We talked but I'm not positive whether we talked about that or not.

Q. One way or the other?

(Testimony of William A. Mauger.)

A. That is right.

Q. How much had you been making prior to the time of the meeting in November of 1947, Mr. Mauger? A. \$90.00 a week.

Q. Were you increased at that time to \$125.00?

A. That is right.

Mr. McDonnell: That is all I have. [89]

Q. (By the Referee): You say your salary was \$125.00? A. That is right.

Q. And it was cut to a hundred?

A. That is right.

Q. And then was restored to you when you terminated your employment?

A. That is correct.

Q. Did you have any such thing as a guaranteed salary in excess of that? A. No.

Q. You had no share of the profits?

A. No. Mr. Hacker was a friend of mine and what he said he would pay me I would take.

The Referee: Anything else?

Redirect Examination

By Mr. Kronick:

Q. Did you ever discuss with Mr. Hacker the proposition of setting up reserves to meet these promises?

A. It was a corporation but Mr. Hacker isn't a man that can run a corporation. I have always maintained to his face and I will testify in court that he should be a one-man operator. He does as he pleases, not as he is given advice.

(Testimony of William A. Mauger.)

Mr. McDonnell: Your Honor, that answer is not responsive to the question.

Q. (By Mr. Kronick): No. I mean do you recall ever discussing [90] with him the matter of setting up reserves to meet these salaries and other debts of the corporation?

A. No, I can't recall that I did.

Q. You can't recall that you ever did?

A. No.

Q. (By the Referee): What do you mean, sir, that reserves were not being set up? What were they not being set up for?

A. Well, a corporation should be on the increase. Its financial position should be being consistently strengthened, not weakened, and we were in the position where we had to ask our employees to take less in order to get us over the tight spots, and the accounts payable were growing instead of diminishing.

Q. That is what you mean by a reserve?

A. That is right.

The Referee: I see. Anything else?

Q. (By Mr. Kronick): When you say large amounts of monies were coming in, can you give us some idea of what the income of the company was during say the early part of 1948?

Mr. McDonnell: Your Honor, I can't see that that question is pertinent to this discussion.

The Referee: Sustained. Proceed.

The Witness: No, I can't.

The Referee: Never mind. There is nothing before the [91] Court. Anything else?

(Testimony of William A. Mauger.)

Mr. Kronick: That is all.

Recross Examination

By Mr. McDonnell:

Q. Were you present at this meeting in May of 1948 when the cut for the employees was discussed?

A. No, I wasn't.

Q. Your salary was cut then without you being present?

A. That is right. I think that meeting was held down at the Broadway store and I was out at the Wilshire store, if I remember right.

Mr. McDonnell: That is all.

The Referee: Any other witnesses?

Mr. Kronick: No, Your Honor.

The Referee: Mr. McDonnell, any witnesses?

Mr. McDonnell: I would like to call Mr. Hacker.

RAYMOND M. HACKER,

called as a witness, being first duly sworn, testified as follows:

The Referee: What is your name?

The Witness: Raymond M. Hacker.

Direct Examination

By Mr. McDonnell:

Q. Mr. Hacker, you were President of Hacker-Byrnes [92] Corporation in 1947 and in 1948; is that correct? A. I was.

Q. You have heard the testimony given by Mr. Mauger and Mr. Egan and Mr. McDonnell concerning some meetings in the latter part of 1947, have you? A. I have.

(Testimony of Raymond M. Hacker.)

Q. Do you recall those meetings?

A. I do.

Q. With particular reference to the discussion as to the amounts to be paid Mr. McDonell and Mr. Egan, would you relate to the Court your recollection of those meetings, beginning with the first meeting and then the second and then I believe there was a third in January.

A. Well, the first meeting, the one in regards to their salaries that were set up, 20, 10 and 12, that was so. I mean they were set up at that salary. They were to draw so much money. Had there not been any profit at the end of the year, probably if the company would have went on, I doubt very much if the employees would have expected that. Had there been a profit their salaries would have been declared as such.

Q. Mr. Hacker, we are not interested in what the employees might have expected. I want you to tell us what happened at the meeting.

A. Well, their salaries were set up at so much money.

Q. Were they guaranteed that salary? [93]

A. If what I told them was a guarantee.

Q. Well, do you recall what you told them?

A. Exactly that this one was to get 20 and the other 12 and the other 10.

Q. Let's start with Mr. McDonell. Do you recall how Mr. McDonell was to be paid the money?

A. There was no set up how Mr. McDonell was to be paid the money, outside of he was to draw

(Testimony of Raymond M. Hacker.)

\$150.00 a week, which he set his own salary, and we all had confidence there would be enough money in the business that that would be what was to be paid.

Q. Was anything said that Mr. McDonell was only to be paid out of profits the \$20,000.00 or any portion of that \$20,000.00?

Mr. Kronick: I'm going to object to this type of examination. It may be informal here, but I don't think he should lead his witness.

The Referee: All right, don't lead the witness. Tell us what your recollection is of the conversation, Mr. Hacker.

A. The meeting was formed after I had purchased Mr. Byrnes' stock, and before profits were to be divided the salaries were to be set at that much money. That is all I recall on it, Mr. McDonnell. I mean I couldn't tell you something that I don't remember in regards to the situation, outside of that was salaries. To my own mind, my own way of thinking, had there been money those salaries would have been [94] set up and paid at the end of the year.

Q. (By Mr. McDonnell): We are interested in what was said, Mr. Hacker, and not your state of understanding of the thing. Was there any paper signed by you?

A. Not that I know of, no.

Q. But you do remember the setting of the salaries? A. I do.

Q. Did you attend a meeting in May of 1948 involving cuts to be made in the salaries of your employees?

(Testimony of Raymond M. Hacker.)

A. There wasn't a formal meeting. It was just a suggestion from Mr. Egan that to meet our present labor payrolls due to doing this type of work we were doing, that the salaries we were paying were exorbitant.

Q. Well, did you have any sort of a get-together at the Broadway store, Mr. Hacker?

A. Not a get-together. I talked to each one individually.

Q. Now, when you talked to Miss Harris—do you recall talking to her?

A. I must have talked to her.

Q. I'm asking you. Do you recall?

A. No, I don't.

Q. Well, do you recall talking to any of those specifically you can name, that took a cut?

A. Mr. McDonell for one. I told Mr. McDonell at the time that we were reducing the salaries in the organization, [95] and at that particular time I knew that the salary he was drawing wouldn't carry him through, he had illness in his home, and that I would personally take care of anything that was outside, whatever the difference in his salary was I would pay personally.

Q. You don't recall talking to Miss Harris at all specifically? A. No.

Q. Do you recall talking to anybody but Mr. McDonell? A. No.

Q. You don't recall any meeting or get-together of the employees? A. No, I don't.

Q. Do you recall having promised anyone at any

(Testimony of Raymond M. Hacker.)

time that the cuts in salary would be restored or given back to them at the end of the year?

A. No, I don't recall promising anyone they would. I always thought it was a cut. Had there been a profit I would have given it to them at the end of the year, but I never mentioned anything to them about making it up to them, that I can recall.

Q. You don't recall promising anyone you would make that up to them?

A. No, I don't recall promising any of the employees outside of Mr. McDonell that I would make it up.

Q. Do you recall any of the employees approaching you [96] at any time concerning their Christmas bonus?

A. Yes, I do recall something in regard to Christmas bonuses.

Q. Can you recall who it was that approached you?

A. No. I know that it was discussed amongst the ones that were holding responsible positions in the company.

Q. When was that?

A. Oh, in 194—well, 1947 and 1948, after purchasing—in 1947 after purchasing Mr. Byrnes' stock, all bonuses and so forth were—any bonus that was to be paid at that time was just whatever we could afford, during Christmas time, whatever I thought I could pay; but there was no set agreement on the bonus after Mr. Byrnes was purchased out.

Q. Did you ever tell anybody, or write anybody

(Testimony of Raymond M. Hacker.)

any communication, that the Christmas bonuses were not to be set as they had been before the time Mr. Byrnes was bought out?

A. That they weren't to be?

Q. That they weren't to be.

A. I discussed it with them. There was no money to pay them.

Q. Who did you discuss it with?

A. With the executives, all of them.

Q. Who do you mean by "executives"?

A. Mr. Shuler and Mr. Egan and Mr. Savage and some of the other employees in the corporation.

Q. How about Mr. Gregory? Did you discuss it with him? [97]

A. No, I never discussed anything in regards to Christmas bonuses or anything else with Mr. Gregory.

Q. Did you discuss Christmas bonuses with Miss Harris?

A. I did discuss Christmas bonuses with Miss Harris and Mr. Smith in regards to the labor.

Q. When was that you discussed Christmas bonuses with them?

A. Oh, I think it was in January or February, after Christmas.

Q. Of what year? A. Of 1948.

Q. And this was their Christmas bonus or someone else's?

A. That they thought that I should take care of our labor, being that I didn't give them anything for Christmas; so at that time I had them figure out

(Testimony of Raymond M. Hacker.)

what their bonuses would be and I paid all the labor but none of the executives or salesmen in the organization, but the labor I did pay.

Q. Did you discuss with Mr. Smith and Miss Harris at that time their Christmas bonuses?

A. No, it was never brought up.

Q. It was never brought up?

A. Not that I know of.

Q. You don't recall any demand having been made on you by them for the payment of the Christmas bonus?

A. No, I do not.

Mr. McDonnell: That is all I have, Your Honor.

The Referee: All right, cross examine.

Cross Examination

By Mr. Kronick:

Q. Insofar as Mr. McDonell is concerned, when he became employed with you, did you know that he was making approximately \$15,000.00 a year at his former place of employment?

A. I didn't know what Mr. McDonell was making.

Q. Did he ever tell you?

A. Later on he did.

Q. Now, to give the—withdraw that. Now, when you bought out Mr. Byrnes' stock, did you own all the stock in the corporation?

A. I did.

Q. And at this meeting in effect you were voting all of the stock and making these men officers and directors of the corporation?

A. I don't know whether this was a formal meeting or a get-together. Had it been a formal meeting my attorney, Mr. Gold, would have been there. It

(Testimony of Raymond M. Hacker.)

was just a discussion of what was going to be.

Q. What happened at this January meeting? Didn't these men carry titles after that meeting? One was a vice-president—

A. I called my attorney and told him what the various [99] titles were that were going to be given to the various employees.

Q. Did you tell him who the directors were also going to be? A. I possibly did.

Q. How many directors did your corporation have, do you remember?

A. Four or five.

Q. And you told your attorney to draw minutes making these men officers and directors of the corporation?

A. I told him to make them officers of the corporation, that is right.

Q. And none of them held any stock in the corporation? A. That is right.

Q. Now, to give the Court some idea of the extent of your operation, isn't it a fact that the General Petroleum job ran into about \$150,000.00?

Mr. McDonnell: I am going to make an objection to that question, the same objection that I made to a similar one a little while ago.

The Referee: I don't think it makes any difference. Sustained.

Mr. Kronick: If I may argue it, in a big business—Your Honor is questioning the salaries of these—the salaries these executives were getting. In a big

(Testimony of Raymond M. Hacker.)

business, the greater the business the greater the salaries you allow. [100]

The Referee: But the question is what agreement was made, not what will be reasonable. No, it is immaterial. Sustained. Proceed.

Mr. Kronick: That is all as far as I am concerned.

Q. (By Mr. Gilbert): Mr. Hacker, was it your belief that these gentlemen, Mr. McDonell, Mr. Egan, and the others who were working at these salaries stipulated, were under the impression and belief that that was their salary and that was what they were to be paid?

Mr. McDonnell: Your Honor, I'm going to object to that question. We are not interested in what the beliefs of the witness were.

The Referee: Sustained. Proceed.

Q. (By Mr. Gilbert): Mr. Hacker, you referred to the share of profits at the end of the year in a certain percentage. Was that to be above and beyond their fixed salaries?

A. What their salaries were set up to be before profit was divided, that was made up. I personally, if there had been no money to make up the difference of their salary, and being as close to the employees as I was, if we hadn't made any money I didn't figure to pay them any more, but I did tell them that is what their salaries would be because I contemplated making enough money to pay them that type of salary.

Q. Then these gentlemen were laboring under the

(Testimony of Raymond M. Hacker.)

belief [101] that they were to be paid at the stipulated fixed salaries; is that correct?

Mr. McDonnell: I object to that question.

The Referee: That calls for the conclusion of the witness. Sustained. Proceed.

Mr. Gilbert: Well, Your Honor, I'm trying to bring out this point. Mr. Hacker knows and he knows well that these gentlemen were working under an agreement by which they were to receive these monies as a fixed or as has been loosely described a guaranteed salary, and he as the corporation, as the complete and full stockholder and as the manager of the corporation, certainly gave them no reason to believe that they were working for any less money. Now, I simply want that to be brought out in Mr. Hacker's testimony.

The Referee: You still can only put into evidence what was written or what was said. Proceed.

Mr. Gilbert: Very well. I will withdraw the question.

Mr. Kronick: I think he didn't answer one question counsel asked him.

Q. These profits, these percentages, that was discussed at that meeting, they were to be paid to these men over and above these salaries which you have testified to; is that correct?

A. If there was anything left after paying the difference of their salaries, what their salaries were set up for.

Q. Then the profits would be divided? [102]

A. That is correct.

(Testimony of Raymond M. Hacker.)

Q. And for that purpose you were to draw not more than \$25,000.00 a year?

A. That is correct.

Mr. Kronick: That is all.

The Referee: Any other questions, Mr. McDonnell?

Mr. McDonnell: That is all.

The Referee: Any other witnesses, Mr. McDonnell?

Mr. McDonnell: No, sir.

The Referee: Have you any other witnesses, gentlemen?

Mr. Kronick: No, Your Honor.

Mr. Gilbert: No, Your Honor.

The Referee: All right. I think we ought to see, Mr. McDonnell, whether there is anything in writing anywhere. Have you examined the minute book?

Mr. McDonnell: Your Honor, for another purpose I made a cursory examination of the books, the minute books, several months ago, and I don't like to depend on my memory. I cannot recall at this time, but certainly the minute books are open to either of these gentlemen at any time. They are entitled to see them under the Bankruptcy Act.

The Referee: Well, let's make this order. We will take a continuance, it is nearly 5:00 o'clock, and before making any ruling I will want to hear from you gentlemen, to see what your views are. It is too late to do that now. So I'm going to continue these cases to a day certain and [103] at that time counsel

for the Trustee will produce the minute books that may be in the possession of the Trustee.

Mr. Kronick: Here is the position we are in. We have been advised they can't find them. Now, our disinterested witness, our sworn testimony, Mr. Mauer, says he drew them up—

The Referee: Then if the Trustee advises you he doesn't have the minute books you subpoena Mr. Gold to bring them in.

A Voice: Does this affect all of them?

The Referee: As far as I know this doesn't affect the claim of Miss Harris or Mr. Smith. However, I won't decide any of them until I get all the information. It will not be necessary for you people to return unless you want to. I will make a ruling on all these claims at the same time.

A Voice: We will be notified of the ruling?

The Referee: Yes. I will see that you people get copies of the rulings made on the claims: and then you understand of course any person dissatisfied with the ruling made by the Referee has a right to file a petition for a review of the decision by the Judge of the court. However, that is a little technical and costs a little money. I'm not trying to discourage you but I want you to understand it is not an entirely simple operation. I don't want you to feel you have to be content with any ruling I might make, any more than the Trustee. He might be content or he might be discontent [104] and review it.

Now, what date do you suggest?

Mr. Kronick: Any date that don't conflict with

my calendar. I have certain fixed dates in mind I now I can't be here.

The Referee: What about Friday, the 20th, at 2:00 o'clock?

Mr. McDonnell: That is agreeable to me, Your Honor.

The Referee: I already have one matter but it shouldn't take too long, and Mr. Gold is going to be here that day, I think.

Mr. Kronick: I will call him before then.

The Referee: He has an application for \$2500.00 fees that may be ruled on that day. So I imagine he will be here.

What became of Mr. John S. Madison?

Mr. McDonnell: I don't know. There is, I believe, an affidavit of service on that.

The Referee: Anybody know Mr. Madison?

Mr. Mauger: I do. I haven't seen him for a month or so.

A Voice: He left the corporation a long time before this came up.

Mr. Hacker: It is a plain frameup, Your Honor. He thought he would get in and get a little money, and he topped them all. [105]

The Referee: All right, continued to January 20th at 2:00 p.m.

Mr. McDonnell: Your Honor, do you wish Mr. Hacker to return at that time?

The Referee: No, I don't think so unless you gentlemen want him. All I want is to have the record complete by any documentary evidence there may be.

All right, January 20th at 2:00 p.m. [106]

Los Angeles, California; Friday, January 20, 1950;

2:00 o'clock p.m. Session

The Referee: Hacker-Byrnes Corporation.

Mr. McDonnell: Ready.

Mr. Kronick: Ready.

Mr. Gilbert: Ready.

Mr. McDonnell: Which matter is that, Your Honor?

The Referee: Well, we will take the application for fees first.

The Referee: Now we have some objections to claims, Mr. McDonnell.

Mr. McDonnell: Can I have just a moment, Your Honor?

The Referee: Yes, I will take a short recess.

(Recess.)

The Referee: All right, you may proceed, gentlemen. Any further evidence on behalf of the claimants?

Mr. Kronick: If your Honor will remember, you suggested a search be made for the minutes or any other records which would indicate a meeting such as was testified to here last time by these men. I have gotten hold of Mr. Gold and he has found a document which is a resume of the meeting held on December 12th which Mr. Mauger testified to. I would like to introduce it as an exhibit on behalf of the claimants. [107]

The Referee: Is there objection?

Mr. McDonnell: Let me get this straight. You are introducing this simply as Mr. Mauger's notes, not as the minutes?

Mr. Kronick: Well, I don't care what you call them.

Mr. McDonnell: Well, I'm trying to get you to put a handle on it.

Mr. Kronick: I would say they are the minutes of that meeting.

Mr. McDonnell: I won't stipulate to them as minutes. These are not the minutes. I have the minutes here.

Mr. Kronick: Let the Court judge for itself.

The Referee: Well, obviously unless they are in the formal minute book of the corporation and properly signed, or if not in the book if they are written up as minutes and signed or to be signed, they cannot be regarded as minutes. Now, as part of your proof you may offer, perhaps, this document as an original notation made at the time of the transaction.

Mr. Kronick: Well, there is just this point, Your Honor. The transaction that happened just as it happened is the thing that controls, not minutes that may be written up two or three weeks later, whether they are signed or not signed. The thing that controls a directors' meeting is done by word of mouth and transcribed later or at the same time. Now, I say the things that happened by word of mouth and what was [108] said there controls, not the written minutes. We might have no control over the writing up of the minutes. They may be taken out of the book or may never be taken out of the book.

The Referee: Well, as a record made at the time or as minutes?

Mr. Kronick: Well, I will offer it at present as

a memorandum of the meeting that transpired on December 12, 1947, as testified to here, as prepared by Mr. Mauger and sent to Mr. Gold.

Mr. McDonnell: With all due respect to counsel, I will object to the introduction of this piece of evidence because there is no identification of this piece of paper.

Mr. Kronick: We will identify it.

Mr. McDonnell: Well, I would suggest then before it is offered you identify it.

The Referee: All right, let's see if you can identify it.

Mr. Kronick: Well, I will ask Mr. Gold to take the stand and be sworn.

LEO K. GOLD,

called as a witness, being first duly sworn, testified as follows:

The Referee: All right, your name is Leo K. Gold?

The Witness: Yes, sir. [109]

The Referee: All right, proceed, counsel.

Direct Examination

By Mr. Kronick:

Q. Mr. Gold, I show you a document entitled "Regular Meeting Held Friday, December 12, 1947," a typewritten document. Will you state to the Court how you obtained possession of that document and where it came from?

A. I got it from Mr. Mauger.

Q. Was it sent through the mail?

A. It was either sent through the mail or he delivered it to me.

(Testimony of Leo K. Gold.)

Q. And would you say you received it approximately on that date, December 12, 1947?

The Referee: While Mr. Gold is thinking about it we will take a recess for a moment. Mr. McDonnell, there is a message. You may leave the court room if you wish.

Mr. McDonnell: Thank you, sir.

(Recess.)

The Referee: All right, you may proceed, counsel.

Mr. Kronick: Mr. Reporter will you read the last question?

(Question read.)

A. Well, it would have to be after that date.

Q. (By Mr. Kronick): Well, I mean approximately how long after?

A. That I don't remember. [110]

Q. Well, was it shortly after or was it a protracted period?

A. I believe it was shortly after that date.

Q. Now, at that time Mr. Hacker owned all the stock in the corporation, did he not, the Hacker-Byrnes Corporation?

A. He did.

Q. And you were attorney for both Mr. Hacker and the corporation?

A. Yes.

Mr. Kronick: That is all.

The Referee: Any questions?

Cross Examination

By Mr. McDonnell:

Q. Now, Mr. Gold, did I understand your testi-

(Testimony of Leo K. Gold.)

money to be that you got this from Mr. Mauger?

A. Yes.

Q. Did he hand it to you personally?

A. I said I didn't remember if he mailed it to me or handed it to me personally.

Q. How did you identify it was from Mr. Mauger? A. This, Mr. McDonnell?

Q. Yes.

A. Because I remember the transaction as to what happened after I got it.

Q. Well, I still am not clear. You are not sure whether [111] it was mailed to you or came to you by hand?

A. No, but looking at it I notice it seems to be folded, and if it is folded then it probably came in by mail because if it was handed to me Mr. Mauger——

Q. You are then just assuming it was from Mr. Mauger. Is it signed, Mr. Gold? A. No.

Q. Has it any directions or markings or writings to indicate who it is from? A. No.

Q. Now, you say you remember the transaction. Would you explain what you mean by "you remember the transaction"? Was there something beyond this piece of paper you have?

A. In other words, I refreshed my memory when I was called by Mr. Kronick if I ever received such a document. Frankly I didn't remember and so I consulted my files and there it was in my files and then I remembered what had happened. I had gotten this from Mr. Mauger and I called Mr. Hacker about

(Testimony of Leo K. Gold.)

it and I told him that I saw this thing and I told him the thing was fantastic.

Q. What do you mean by "fantastic"?

Mr. Kronick: I'm going to object to this type of cross examination. Here we have claimants who are parties to a transaction. They have entered into a transaction with Mr. Hacker, the president and owner of all of the stock. The transaction is not disputed orally by either Mr. Hacker or [112] anybody else. It is backed up by a document written up and sent to the attorney for the corporation at the present time. Now, if they are permitted in the face of the evidence rule that conversations with third parties relating to a contract cannot be admitted against the claimant, I am going to object at this time that this is not proper evidence.

The Referee: Sustained. Proceed.

Q. (By Mr. McDonnell): Mr. Gold, I hand you a book marked "Minutes" and ask you if you can identify this book?

A. It is the minute book of the Hacker-Byrnes Corporation.

Q. Hacker-Byrnes Corporation, the bankrupt here; is that correct? A. Yes.

Q. I show you a sheet of paper headed "Minutes of Special Meeting of Board of Directors, Hacker-Byrnes Corporation," and beginning "A special meeting of the Board of Directors of Hacker-Byrnes Corporation was held on November 1, 1947," and ask you if you can identify this sheet?

A. Yes, they are the minutes I prepared.

(Testimony of Leo K. Gold.)

Q. And how many sheets were there to the minutes of the meeting of November 1, 1947?

A. I see three there. There were three.

Q. Three sheets, three pages? A. Yes.

Q. You are acquainted with the signature of R. M. Hacker? [113] A. Yes, I am.

Q. I show you a signature on the third page of the minutes of November 1, 1947, and ask you if you can identify it?

A. That is his signature.

Q. The signature of Mr. Hacker?

A. Yes.

Q. Are you also familiar with the signature of Miss Corrine Harris? A. Yes, I am.

Q. And can you identify the signature——

A. It is not Corinne. It is Connie.

Q. I'm sorry. And is that the signature of Connie Harris? A. Yes.

Q. Now, in the minutes you have identified as those you prepared by you—is that correct?

A. Yes.

Q. (Continuing) ——of the meeting of November 1, 1947, I call your attention to an item on the second page thereof beginning, "Discussion was then had referable to fixing of salaries of the directors and officers of the corporation. The following resolutions, having been moved and seconded, were unanimously adopted."

Skipping a paragraph and proceeding to the second paragraph [114] thereunder: "Resolved further, that commencing as of November 5, 1947, the salary

(Testimony of Leo K. Gold.)

of J. J. McDonell, First Vice-President and General Manager of the corporation, be and it is hereby fixed at \$150.00 per week payable weekly.”

Did you prepare that paragraph that I have just read, Mr. Gold?

A. You mean——

Q. With reference to Mr. McDonell’s salary at \$150.00 a week?

Mr. Kronick: I am going to object unless Mr. Gold testifies upon what basis or what information or on whose instructions he prepared that minute. Otherwise it is purely hearsay.

Mr. McDonnell: Counsel finds himself in an odd position. I was attempting to get Mr. Gold to explain it a moment ago. I intend to find out whether there is any difference between the minutes and that note.

The Referee: Are you attacking the minutes?

Mr. McDonnell: No, I’m not attacking the minutes.

Mr. Kronick: It is a prior meeting also.

The Referee: Then the objection is sustained. Do you wish to offer the minutes?

Mr. McDonnell: I wish to offer the minutes of the meeting of November 1, 1947, in evidence at this time.

Mr. Kronick: I am going to object on the ground they are immaterial, Your Honor. They prove nothing in issue here. [115] The record and the testimony here relates to the meeting which was held

(Testimony of Leo K. Gold.)

after that date and has absolutely nothing to do with that particular minute.

The Referee: Overruled. It will be Trustee's Exhibit 1. Wait a minute. You have pulled out too much, didn't you? Didn't you say these minutes were three pages?

Mr. McDonnell: Did I give you more, Your Honor?

The Referee: You didn't give me enough, I'm afraid. Did you? You only gave me two pages of minutes.

Q. (By Mr. McDonnell): How many pages are there? A. Three pages.

The Referee: You haven't given me the first page.

The Witness: Here it is right here.

Mr. McDonnell: Yes, here it is (handing document to the Court).

The Referee: All right, Trustee's Exhibit 1.

TRUSTEE'S EXHIBIT No. 1

Minutes of Special Meeting of Board of Directors

Hacker-Byrnes Corporation

A special meeting of the Board of Directors of Hacker-Byrnes Corporation was held on November 1, 1947, at 10:00 a.m. at the offices of the corporation, 9015 Wilshire Boulevard, Beverly Hills, Calif., pursuant to the foregoing written waiver of notice and consent to holding of said meeting.

Present: R. M. Hacker, Chairman; J. J. Byrnes, being all of the directors of said corporation.

Trustee's Exhibit No. 1—(Continued)

The Chairman of the Board announced that there was a vacancy in the Board of Directors. J. J. McDonell was unanimously elected to fill the vacancy in the Board of Directors.

J. J. Byrnes then submitted his resignation, in writing, as Vice-President, Secretary-Treasurer and Director of this corporation.

By reason of the vacancy in the Board of Directors due to the resignation of J. J. Byrnes, the remaining directors unanimously elected Edmond G. Egan to fill the vacancy in the Board.

Discussion was then had by the Board with reference to the fact that the only office which was filled was that of R. M. Hacker, as President of the corporation. The following persons were then unanimously elected to the offices indicated:

J. J. McDonell: First Vice-president and General Manager of corporation.

Edmond G. Egan: Second Vice-President and manager of Olympic and Broadway store.

Glenn A. Savage: Third Vice-President and manager of Pico and Broadway store.

Robert Schuler: Fourth Vice-President and manager of Wilshire-Beverly Hills store.

Connie Harris: Secretary and general office manager.

W. A. Mauger: Treasurer and Comptroller of corporation.

Discussion was then had referable to fixing the salaries of the directors and officers of the corpora-

Trustee's Exhibit No. 1—(Continued)
tion. The following resolutions, having been made and seconded, were unanimously adopted:

Resolved: That commencing as of December 3, 1947, the salary of R. M. Hacker, President, Chairman of the Board and Director of this corporation, be and it is hereby fixed at Five Hundred Dollars (\$500.00) per week, payable weekly.

Resolved Further: That commencing as of November 5, 1947, the salary of J. J. McDonell, First Vice-President and General Manager of the corporation, be and it is hereby fixed at One Hundred Fifty Dollars (\$150.00) per week, payable weekly.

Resolved Further: That commencing as of November 5, 1947, the salary of Edmond G. Egan, Second Vice-President and Director of this corporation, be and it is hereby fixed at One Hundred Fifty Dollars (\$150.00) per week, payable weekly.

Resolved Further: That commencing as of November 5, 1947, the salary of Glenn A. Savage, Third Vice-President of this corporation, be and it is hereby fixed at One Hundred Fifty Dollars (\$150.00) per week, payable weekly.

Resolved Further: That commencing as of November 5, 1947, the salary of Robert Schuler, Fourth Vice-President of this corporation, be and it is hereby fixed at One Hundred Twenty-five Dollars (\$125.00) per week, payable weekly; but commencing as of January 7, 1948, said salary shall be increased to One Hundred Fifty Dollars (\$150.00) per week, payable weekly.

Resolved Further: That commencing as of Novem-

Trustee's Exhibit No. 1—(Continued)

ber 5, 1947, the salary of Connie Harris, Secretary of this corporation, be and it is hereby fixed at Ninety Dollars (\$90.00) per week, payable weekly; but commencing as of November 12, 1947, said salary shall be increased to One Hundred Dollars (\$100.00) per week, payable weekly.

Resolved Further: That commencing as of November 12, 1947, the salary of W. A. Mauger, Treasurer and Comptroller of this corporation, be and it is hereby fixed at One Hundred Twenty-five Dollars (\$125.00) per week, payable weekly .

Discussion was then had by the directors referable to the retirement of J. J. Byrnes, as Vice-President, Secretary-Treasurer and Director of this corporation. It was pointed out that while Mr. Byrnes was in office he rendered services of a value far in excess of the salary which was paid to him, and it was the recommendation of the members of the Board that the 1947 Cadillac 4-door sedan automobile, License No. 65W805, Engine No. 5424576, be transferred to him as an honorarium in appreciation of his excellent guidance of this corporation while he held said offices. On motion duly made, seconded and carried, it was unanimously

Resolved: That the President and Secretary of this corporation be, and they are hereby authorized, to sign any and all documents, including bill of sale, certificate of title and California certificate of registration, which may be necessary to effect the transfer of title and ownership of that certain 1947 Cadillac automobile owned by this corporation,

Trustee's Exhibit No. 1—(Continued)

License No. 65W805, Engine No. 5424576, to J. J. Byrnes in recognition of the work done by the said J. J. Byrnes for and on behalf of this corporation in his capacity of director, Vice-President and Secretary-Treasurer, and in appreciation of his excellent guidance of this corporation while he held said offices.

Resolved Further: That the President and Secretary of this corporation be and they are hereby authorized to execute a general release, for and on behalf of this corporation, to discharge the said J. J. Byrnes from any liability which he may have to the corporation including, but not limited to the balance which he may owe to the corporation, as is reflected on the books and records of the corporation.

There being no further business to come before the meeting, on motion made and seconded, it was Adjourned.

/s/ R. M. HACKER,
Chairman.

Attest:

/s/ CONNIE HARRIS,
Secretary.

[Endorsed] Filed Jan. 20, 1950.

Q. (By Mr. McDonnell): Were those minutes that we have just offered in evidence, Mr. Gold, made off the memo which you have previously been handed by other counsel? A. No.

Q. They were not made off the memo?

A. This memorandum came after that date.

(Testimony of Leo K. Gold.)

Q. Did you incorporate that memorandum in the minutes?

A. How could I? That is dated November 1st, I believe.

Q. Did you incorporate it in the minute book at any time? [116] A. No.

Q. That memorandum was never included in the minute book? A. No.

Q. Could you explain why you never incorporated it in the minute book?

Mr. Kronick: I object to that, Your Honor.

The Referee: Sustained. Anything else?

Q. (By Mr. McDonnell): What is the date of the meeting on the memorandum you were handed, Mr. Gold?

A. It says December 12, 1947.

Q. Did you incorporate any minutes in the book as of December 12, 1947?

Mr. Kronick: I object to this on the ground the book is the best evidence.

The Referee: Well, we will sustain the objection but Mr. Gold may examine the minute book and tell us whether or not he finds any minutes of a meeting—of December 12th, was it?

The Witness: Let the record show that I am looking at the minute book and I see no minutes for December 12, 1947.

Q. (By Mr. McDonnell): Did you prepare any minutes for the meeting of December 12, 1947?

A. I did not.

Mr. McDonnell: That is all.

(Testimony of Leo K. Gold.)

The Referee: All right. Any questions, counsel?

Redirect Examination

By Mr. Kronick:

Q. Mr. Gold, going back to this meeting of November 1st, the minutes which you stated you prepared, isn't it a fact that you also prepared those from a memorandum sent to you by either Mr. Mauger or Miss Harris, the secretary?

A. Well, it was either done by a memorandum or orally, you see.

Q. Well, when you say "orally," who instructed you to draw those minutes of November 1, 1947?

A. That I can't remember. It would either be Mr. Hacker or Mr. Mauger would call up and say—sometimes they would write me a letter and say draw minutes.

Q. Now, I note that in that meeting of November 1st Mr. Byrnes and Mr. Hacker were the directors present at that meeting. Was Mr. Byrnes out of the corporation at that time?

A. On November 1st was the date he got out, and if you will look at the minutes you will notice that he resigned on that date and did not participate in the transaction. Mr. Egan I think came in then.

Q. Do you know whether or not these other gentlemen who were appointed that day were present at this meeting?

A. At this meeting?

Q. Yes. A. I wasn't at the meeting.

Q. Oh, you weren't at the meeting? [118]

A. Oh, no, I'm positive I wasn't at the meeting.

Q. So from the information you have you don't

(Testimony of Leo K. Gold.)

know who was present at that meeting; is that correct?

A. Repeat that, please, Mr. Kronick.

Q. I say as far as your personal knowledge is concerned you don't know who was present at that meeting?

A. I don't even know if there was a meeting. Some of these meetings that were held, they never had any formal meeting. There wasn't a convening of the directors. In other words, we would say, "We need a record covering a bank resolution," for example, and then we would draw it up.

Q. I am referring to this specific one.

A. I really can't remember. In other words, there might have been a formal—I mean there might have been informal discussions. I know I have been down at the store many times, but I can't remember being at this formal meeting. I don't think it was a formal meeting, as a matter of fact.

Q. And do you know whether or not Mr. McDonell or Mr. Savage or Mr. Egan or Mr. Shuler were present at this meeting on November 1st, 1947?

A. I know they were in the store.

Q. That we will admit, that they were working there.

A. Well, that is where the meeting says it was held, you see, but I wouldn't know. I really wouldn't know.

Q. However, you were later informed, weren't you, of [119] a meeting Mr. Hacker had with these

(Testimony of Leo K. Gold.)

gentlemen where these salaries which you say are fantastic were discussed and set up?

A. I didn't say that—I told Mr. Hacker they were fantastic.

Q. But he did say they had been set up; is that a fact?

A. No, that is not the conversation we had about it.

Q. Well, he testified here last week those were the salaries that were set up. Didn't he state that to you?

A. I will have to give you the entire conversation as best I can remember it, and even then I can only give you the substance of it. I couldn't remember the conversation.

Mr. Kronick: Well, I will withdraw the question. That is all.

The Referee: Any other questions, Mr. McDonnell?

Recross Examination

By Mr. McDonnell:

Q. Of your own knowledge, Mr. Gold, do you know that there was a meeting on—what is the date on that piece of paper? December 1st, is it?

A. December 12th?

Q. December 12, 1947.

A. Of my own knowledge? No.

Q. You were not present?

A. I was not present. [120]

Mr. McDonnell: That is all.

Mr. Kronick: Just one more question, Mr. Gold.

(Testimony of Leo K. Gold.)

Redirect Examination

By Mr. Kronick:

Q. Whose possession has this minute book been in say since some time before the assignment?

A. Since—would you kindly give me that and I will tell you when.

Q. A factional fight started there between Mr. Hacker and these new people that came in, and I understand Mr. Hacker resigned and was forced out. I would like to know where this minute book has been say from that time on.

Mr. McDonnell: Your Honor, that question is so ambiguous, I can't figure out what he means by "from that time on."

The Witness: I think I know what he means.

The Referee: I think probably the witness understands it. Objection overruled.

The Witness: When did it leave my possession, is that what you mean, Mr. Kronick?

Mr. Kronick: Yes.

The Witness: I have a letter in my file to Julian Isen of Loeb & Loeb and I transmitted the minute book to him with the stock book for his inspection on September 8, 1948.

Q. (By Mr. Kronick): And you haven't had it in your [121] possession since?

A. No, wait. Something happened after that. In other words, there was some deal that was being developed—no, that is not it. There was a contract that Fred Horowitz was making up with—no, strike that. Fred Horowitz I think came in later. I have it

(Testimony of Leo K. Gold.)

now. Mr. Kaplan was represented by Julian Isen of Loeb & Loeb, and they wanted the employment agreement and he wanted to see the minute book of the corporation, but I think before that the minutes went to Fred Horowitz because he prepared—let's see if I can refresh my memory from the minute book. In other words, Fred Horowitz had it and then Julian Isen. Here it is. That is right. On June 23, 1948, about that date, I delivered the minute book to Fred Horowitz, an attorney in the Union Bank Building, and this employment contract developed, and then I got it back for a short time—I say short. I mean between June and September. Then I sent it to Julian Isen on September 8, 1948, and then I got it back on September 21, 1948. Then I think Mr. Fred Horowitz got it again.

Q. He was the attorney for the new faction, wasn't he?

A. For Mr. Sommers, yes. Let me see if I can tell you that. I can tell that to the best of my knowledge, because Mr. Hacker—they had prepared a resignation for Mr. Hacker. In other words, they were forcing Mr. Hacker out.

Q. Well, you say—

A. I think it is in here. [122]

Q. When did you finally get rid of the book?

A. I gave it to Mr. Horowitz and I don't think I ever saw it again, because—then I heard that Mr. Buchalter had the book, and then I think he turned it over to the assignee.

Q. Just one more question. Isn't it a fact that

(Testimony of Leo K. Gold.)

this memorandum of purported minutes was not put in the minute book because Mr. Hacker told you not to put it in? A. That is correct.

Mr. Kronick: That is all.

The Referee: All right, Mr. McDonnell, any further questions?

Recross Examination

By Mr. McDonnell:

Q. What reason did Mr. Hacker give you, Mr. Gold, for not putting it in the minutes?

Mr. Kronick: Just a minute. That is hearsay. I didn't ask for the conversation.

The Referee: Sustained. Proceed.

Mr. McDonnell: No more questions.

The Referee: All right, anything further from Mr. Gold?

The Witness: If Your Honor please, there are some pencil notations on here.

The Referee: It isn't in evidence yet. Now, what do [123] you want to do with it?

Mr. Kronick: I want to introduce it in evidence as a resume of the meeting of the Hacker-Byrnes Corporation, a directors' meeting, which was held on Friday, December 12, 1947.

The Referee: Is there objection?

Mr. McDonnell: I object to the introduction of that in evidence as a document which has not been identified. It has simply been identified as received through the mail. There is no signature to identify its source or where it came from.

The Referee: Oh, well, let's leave that aside for

a minute. Suppose it is identified, for instance, by Mr. Mauger as an instrument he did cause to be written up, or he did write it himself, still is it admissible in evidence? All it is, it is a memorandum made by someone in attendance at a meeting who was charged with the duty of making such a memorandum. Now, is it anything more than just a memorandum? It could be used, naturally—if Mr. Mauger were still here and were put on the witness stand and he would say, “My memory doesn’t serve me sufficiently to enable me to testify to all the details that transpired, but I did make a memorandum and if I could be allowed to refer to that memorandum it would assist me in testifying,” he could look at it; but can the instrument itself be received in evidence as evidence of what transpired at the meeting? What is your view on [124] that?

Mr. McDonnell: Your Honor, the document as it stands is nothing more than hearsay. It is a record made by Mr. Mauger of things heard and recalled by him at the meeting, and as transcribed by him. It isn’t any record of what he said.

The Referee: Well, I don’t think you can offer in evidence a writing as a summary of the testimony of a witness.

Mr. Kronick: Your Honor, these are minutes. If this is hearsay everyone of the minutes in that book are hearsay. It is a recordation of what happened at a certain date or a certain time.

The Referee: I don't agree with you on that unless you have some authorities on the point.

Mr. Kronick: I mean just as a practical matter.

The Referee: Let me explain my view on it, and if I'm wrong I want you to point out to me why I am wrong.

Trustee's Exhibit 1 is an instrument taken from the formal minute book of the corporation, having been recorded in there. It is signed by the chairman and the secretary of the meeting. Obviously it is not conclusive proof as to what happened at the meeting, but it is competent evidence as to what transpired, subject to being contradicted by other competent evidence.

But the paper you have here is just simply a memorandum [125] made by Mr. Mauger, and I think Mr. McDonnell's objection on that point is not well taken. I think the evidence is connected up. This is the memorandum which Mr. Mauger testified he made up and sent to Mr. Gold, but still it is only Mr. Mauger's conclusions as to what happened and doesn't have the force and sanction of an official minute of the meeting.

Mr. Kronick: Except this, Your Honor: As has been testified to here, these minutes have to start some place. They start with a meeting of a company with the directors present and certain things are said and notations are made. Sometimes or most of the times the persons there do not set the minutes up in legal form, so they send a notation to the at-

torney to set them up in legal form. He sets them up in legal form and sends them back and they are signed.

The Referee: Wait a minute. You take it for granted they are going to be signed, but very often after the attorney puts them in legal form the chairman of the meeting says, "That isn't what happened, that has to be changed," or the secretary says, "That isn't what happened, that has to be changed;" and some corporations, of course, are so formal that they require all directors present to sign the minutes. One or the other may say, "No, that is not my recollection and I'm not going to approve that."

Mr. Kronick: Let's go to a point other than that. Here is a document which does not come from the claimants. [126] It comes from the corporation, from their records, from their attorney. Now, you say this is his recollection of what happened at that meeting. It is not only his recollection of what happened at that meeting. It is the corroboration or it has the corroboration of four or five witnesses, including Mr. Hacker himself; and I think the statements taken by him there as controller and transcribed and set up—they may not be admissible as a minute of this corporation. I didn't introduce them as such.

The Referee: What did you introduce them for then?

Mr. Kronick: I introduced them as a resume of what happened at that particular meeting, at that particular time.

The Referee: All right, let's get down to the law on evidence. Is such a resume admissible in evidence?

Mr. Kronick: I would say under the corporation laws, yes, because that is the way you act in a corporation. The book is under the control of Mr. Hacker. These men are directors practically in name only. He passes a resolution in their presence and sends it on to Mr. Gold and then he tells Mr. Gold not to prepare the minutes. I would say this is additional evidence as to what transpired at that meeting.

The Referee: Well, do you have any authorities on it? If you do, I would like to have them. I don't want to commit error here, but all my inclination is against you.

Do you want to be a friend of the Court, Mr. Gold?

Mr. Gold: There is an authority called the Della Montanya case. It holds that in closed corporations you need not have regular formal minutes.

Mr. Kronick: That is in our favor.

Mr. Gold: Yes, I say that; but I do want to say this, that this thing here, while it was given to me by Mr. Mauger, Mr. Mauger was the one who customarily would tell me that we need a resolution for a certain thing, you see, and then I would draw it up, and it is true that I would send it back to them to be signed. That is true, naturally I did, and if it was incorrect—as a matter of fact, I have some minutes that are incorrect that I had to pull out as

being incorrect. I would strike it and would insert the proper way of doing it.

The Referee: Well, then you say the case holds there need not be formal minutes of a closed corporation, are you saying that to be binding on the corporation there need not be formal minutes?

Mr. Gold: Frankly I don't know how far that case goes. I know that we have been citing it quite frequently. I am surprised I don't know the first name of the case. It is readily available. If I had a Wiggins here I could spot it immediately. He cites it for that authority.

The Referee: No, we don't have that.

Mr. Gold: And the case is good authority for that point. In other words, I gathered from that case that if a [128] meeting were held and it was the intent of the directors that that which transpired at the meeting should be the action of the Board of Directors, you see, then that would be just as good as if it were signed. That is my understanding of the case.

Mr. Kronick: That is my contention.

The Referee: Yes, but that is what bothers me. The instrument we have here now is simply the conclusion of the secretary or the stenographer as to what happened. I am not ruling at this time that the Court cannot consider the verbal testimony of what happened at that meeting and cannot from that testimony arrive at a conclusion as to whether a contract was made or wasn't made between the corporation on the one hand and the individuals in-

volved on the other; but my anxiety here is whether or not it is proper for this Court to receive in evidence this informal resume of what did transpire.

Mr. Gold: It would be from these memorandums that I would construct the minutes.

The Referee: That is true, but still they couldn't be minutes.

Mr. Gold: If Your Honor please, I want both attorneys to know I'm not trying to favor either side, but that is the truth. I would be given either a memorandum, a letter—I have some letters in my file where Mr. Mauger would say, "Change the principal place of business to so and so." I [129] would draw the minutes up and send them back to them; and there would be times when they would call me up and say, "Draw a resolution for the Bank of America."

Mr. Kronick: In other words, that was the custom of the corporation? Part of the custom was to ask you to prepare minutes from a memorandum?

Mr. Gold: Or Mr. Hacker would call me on the phone.

Mr. Gilbert: As to the admissibility of this document as hearsay, may I suggest it is a proper memorandum made in the course of business. We have shown that was customary, that Mr. Mauger was the secretary of the corporation, he attended the meetings. He did as a result of that meeting prepare this memorandum, and that this document, although not having the full force of a formal signed resolution

—or minutes of the directors' meeting as found in the minute book, is nevertheless a proper document to come within the exceptions to be found in the business entries exception to the hearsay rule.

The Referee: Yes, but you have to recognize, counsel, that the custom of this corporation was for all minutes to be signed after they were formally prepared by the attorney.

Mr. Gilbert: Well, we are at this point, where to prove by written documents that these informal minutes as prepared by the secretary who was in fact in attendance at such meeting, he did prepare these notes. Now, I think we [130] have a right, if we are going to establish a fact through out proof, that we should in all instances be entitled to go back and dig up the memorandums if there is any conflict, and there is at this point. We find no such record in the minute book of any meeting being held on December 12th, and for that reason this is consequently the best evidence of such a meeting, and as shown by the secretary's memorandum as such is admissible hearsay.

The Referee: All right, the objection is sustained. It will be marked Claimant's Exhibit A for Identification.

CLAIMANT'S EXHIBIT A FOR IDENTIFICATION

Regular meeting held Friday, Dec. 12, 1947.

Present were R. M. Hacker, Pres. J. J. McDonnell, V. P. & Gen. Mgr. Glenn Savage, V. P. Edmond Egan, V. P. Robert W. Schuler, V. P. W. A. Mauger, Comptroller & Connie Harris, Secy.

Salaries of officers were set as follows:

R. M. Hacker, President	\$26,000.00 Payable 500. weekly
J. J. McDonnell, V.P. & Gen. Mgr.	20,000.00
Glenn Savage, V.P.	12,000.00
Edmond G. Egan, V.P.	12,000.00
Robert W. Schuler, V.P.	10,000.00

However, the present salary checks are to continue as follows:

J. J. McDonnell	150.00 weekly
Glenn Savage	150.00 weekly
Edmond G. Egan	150.00 weekly
Robert W. Schuler	150.00 weekly

until the end of the year, when each officer would be entitled to draw the balance of his annual salary due him. Any monies over and above regular salary checks requested by any officer would have to be voted by the Board.

Officers are to be enabled to buy stock.

At the end of the year, a sum designated by the Board of Directors as distributable profits are to be distributed as follows:

50% to R. M. Hacker which will include bonuses to Mauger, Connie and the office force.

The balance, or 50%, will be distributed as follows:

(Testimony of Edmund G. Egan.)

aries were set up was on or about [132] the 30th of November, 1947?

Mr. McDonnell: I object to that question as leading and suggesting the answer to the witness.

Mr. Kronick: It is a preliminary question.

The Referee: Sustained. You don't need to lead him. Ask your questions.

Q. (By Mr. Kronick): Do you recall the date that you gave at the last hearing as to the date of the meeting wherein the salaries were fixed?

A. Well, there were two meetings that I remember. I believe I testified that happened on the 30th of November.

Q. Now, I show you this document, Claimant's Exhibit A for Identification. Did you ever see that document before?

A. Yes, I believe Mr. Mauger showed it to me before he sent it in to Mr. Gold, to corroborate that this was exactly the way it was supposed to have been.

Q. You saw it before it was sent to Mr. Gold?

A. Yes.

Q. Now, you will note that that document is dated Friday, December 12, 1947. Does that refresh your recollection as to the exact date of the meeting?

A. Well, I don't know how that happened — I don't know how we happened to get on the date November 30th. I don't recollect how I got that date. That is approximately what I thought it was, I guess. This is the first time I [133] have seen this paper

(Testimony of Edmund G. Egan.)

since then, so it could very well have been December 12th instead of November 30th.

Q. Now, looking at the contents of this—where these various salaries are set up, etc., is that the substance of the meeting that was held about which you testified on your last examination?

Mr. McDonnell: I object to the question because Mr. Egan has already testified he testified to several meetings, and that doesn't identify the particular meeting.

The Referee: Read the question, Mr. Reporter.
(Question read.)

The Referee: Do you think that is a proper question, counsel? That is simply asking this gentleman for his conclusion. After all, he testified about the meeting. He was there. He testified as to his recollection of what happened. If he has anything further to add from his recollection—you can't use that to refresh his recollection. He didn't make it.

Mr. Kronick: Well, he saw it at the time it was made, Your Honor.

The Referee: What?

Mr. Kronick: He saw it immediately after it was made.

The Referee: No, I don't think so. Sustained. Proceed.

Mr. Kronick: Nothing further. [134]

Cross-Examination

Q. (By Mr. McDonnell): You stated, Mr. Egan, that you had seen this document in the possession of Mr. Mauger; is that correct?

(Testimony of J. J. McDonell.)

couldn't testify at the present time to the exact date.

Q. But you are sure such a meeting was held?

A. Oh, definitely.

Mr. Kronick: That is all.

Mr. McDonnell: No further questions.

The Referee: Any other evidence? What about this claim of this gentleman who hasn't come in, John S. Madison?

Mr. McDonnell: There is proof of service on file against [140] Mr. Madison.

The Referee: Well, what is it all about?

Mr. McDonnell: I am in a rather peculiar position. I have to depend entirely on what Mr. Hacker tells me about Mr. Madison and his claim, and I can relate that to the Court if you would like to hear it. That is all the information I have and that is the basis on which I brought the objection.

The Referee: Your notice went to the claimant in care of a firm at 208 W. 8th Street in Los Angeles. There is no attorney-in-fact named on the claim, and the claimant's address is given on the claim with the notation, "also send notices to the firm you sent the notice in care of, 208 West 8th Street.

The question is whether the claimant has had notice of these objections.

Mr. McDonnell: He directs on the claim itself that notices be sent to this firm at 208 West 8th Street.

The Referee: He says also send notices.

Well, all right, let's take a short recess and then we will go ahead.

(Recess)

The Referee: All right, gentlemen, the evidence is in.

We have several situations here which are present in all or some of the claims here before the Court.

First, the claims of those who it appears may have all [141] been directors of the company at one time or another, but in any event all of whom had a very substantial profit-sharing interest in the corporation, who assert that they were guaranteed salaries, as they put it. Those salaries have not been paid in full, and they now claim the balance unpaid.

That is one angle.

Then we have the bonus angle where it is contended that all the employees were entitled to an annual bonus of 3 per cent on the total amount of their annual salaries.

Then we have the question of this cutback which, so it is said, was to be restored some time in the future; and we have I think one or two incidental vacation claims. We have a claim for 2 weeks automobile expense or 2 months automobile expense; and also in one of the claims I think there is a claim for additional salary which the claimant said was promised to him or assured him.

Now those are the different situations that we have present in one or more or all of these claims in one way or another.

Well, let's take them up and see what the proper disposition may be.

Let's hear from you first, Mr. McDonnell, on the first situation I mentioned. Were all of these gentlemen members of the board of directors at one time or another?

Mr. McDonnell: I beg your pardon? [142]

The Referee: Were they all members of the board of directors at one time or another? Who are the men who are involved in the salary situation?

Mr. Kronick: There are only 3 directors, Your Honor, in the corporation. The others were made officers.

The Referee: Well, we have Mr. McDonell, Mr. Egan——

Mr. Kronick: Those two were the directors along with Mr. Hacker. The corporation only had three directors.

The Referee: And they claim unpaid salaries.

Mr. Kronick: As officers and employees of the corporation.

The Referee: Yes. Now, is there anyone else in that particular category?

Mr. McDonnell: No, I think those are the only two here.

The Referee: Then was it Mr. Gregory who asserted that Mr. Hacker had said to him, "I guarantee you or promise you a total salary of so much a year?"

Mr. McDonnell: I thought that was Mr. McDonell, Your Honor.

The Referee: No, no, Mr. McDonell and Mr. Egan are involved in this meeting that was held.

Mr. McDonnell: Yes.

The Referee: And where it is alleged they were to have a definite share in the profits with a guaranteed salary, so they put it, of so much money. Those are the only two in [143] that category; is that correct?

Mr. Kronick: That is correct, Your Honor.

The Referee: Now, Mr. Gregory's claim is——

Mr. McDonnell: \$6169.86.

The Referee: Yes, but the number of his claim I want.

Mr. McDonnell: No. 126.

The Referee: Yes. He is the one that asks for \$4625.00 as the balance of a salary of \$10,000.00 which he said he was promised for 1948.

So let's take up Mr. McDonell and Mr. Egan because their claims are for salary and nothing else. Is that right?

Mr. Kronick: That is correct, Your Honor.

The Referee: All right. What do you think about those two claims, Mr. McDonnell?

Mr. McDonnell: Are you confining this for the moment to Mr. McDonell's claim, general claim, in the sum of \$16,064.00?

The Referee: Well, you might just as well consider the two as one claim because I shall not allow Mr. McDonell any priority. I don't think he is entitled to it under the law. If he is allowed anything it will all be as a general claim.

All right, what do you think about that situation?

Mr. McDonnell: Well, when I left the court room after the last hearing I was somewhat dubious about

the situation. I was confused after the testimony, but after examining the [144] minute book, particularly the minutes admitted in evidence, which established under the official seal of the corporation and as an official act of the Board of Directors the salary of Mr. McDonell in the sum of \$150.00 a week and said nothing whatsoever about the additional guarantee which Mr. McDonell claimed was to be his and under which he is filing this claim, I became of the opinion that Mr. McDonell should only be accorded the actual salary granted him in the minutes. Now, this other extraneous document which has been admitted in evidence—not in evidence, but merely for identification, I feel that has no standing in establishing his salary in the face of the formal minutes prescribed by the law in California. The time any such meeting took place is even unclear from the testimony here today. They all admit there were a number of discussions, and I submit it is conceivable that one of the discussions is the one we find embodied in the minutes and establishing the salary of \$150.00 a week; and I feel on that basis the claim of Mr. McDonell should be disallowed.

The Referee: Well, gentlemen, I have no doubt in my mind but what there was a discussion by Mr. Hacker and Mr. McDonell and Mr. Egan and perhaps some other persons along the lines that have been testified to here. Now, what date it occurred isn't clear. Mr. Gold testified that he received the memorandum which is Claimant's Exhibit A for Identification some time after the date which appears on it, and [145] that date is December 12th.

At the previous session we had here the testimony was that the meeting in question or the gathering in question took place probably on November 30th.

I have that in mind. I think there was such a session, and at that time I am satisfied that there was a discussion as to what each of the individuals here involved were to receive, and I am satisfied that it was stated that Mr. McDonell was to get a salary—no, that his share of the profits was not to be less than whatever the amount is he contends for, \$20,000.00 I think a year. Is that right?

Mr. Kronick: That is right.

The Referee: And also that Mr. Egan's share of the profits was not to be less than \$12,000.00, and I am satisfied that those figures were referred to as salaries. Whether they used the term "guaranteed salaries" I don't know, but they just didn't say, "Mr. McDonell shall receive not less than \$20,000.00, Mr. Egan shall not receive less than \$12,000.00," as the term "salaries" was used in that discussion; but it was also agreed that the weekly stipend for each of them should not be more than such and such a figure, as has been testified to here; and I think there was at least a general understanding that the item designated by the term "salary" was in each instance to be paid in full at the end of the year, but from then on it becomes very confusing and very indefinite. I don't think that there was any clear understanding as to just what was agreed to for [146] the time of the payments. It was at the end of the year, but what year? A year from the date the meeting was held? A year from the end of the month in which the meet-

ing was held? The end of a calendar year, or what?

Mr. Kronick: If I may interject, I think the testimony was beginning on the 5th of November, 1947.

The Referee: What?

Mr. Kronick: Beginning as of the 5th of November, 1947.

The Referee: Yes, these salaries were to begin, but it is inconceivable to me that it was ever intended that on the 5th of November, 1948, this very substantial balance remaining unpaid on these salaries was on that day to be payable. They just didn't get down to that fine point. They just said, "It is going to be \$12,000.00 a year, it is going to be \$20,000.00 a year. At the end of that time, at the end of the year, the difference between the agreed weekly check and the total annual salary is to be paid."

There is your indefiniteness on that point.

Now, there isn't any question but what the rule is established in California that officers, directors and stockholders may be creditors of the corporation with which they are connected. Perhaps the 9th Circuit goes farther in that direction than other circuits in the country. So that is the rule of law that we are confronted with here and which we must follow; but along with that rule of law is also the rule that wherever there is a transaction between an officer, [147] stockholder or director of a corporation and the corporation, before any claim arising out of that transaction can be enforced it must be shown to be reasonable and equitable and proper.

Now, for instance, we had the Shanahan case in which there were two elements. The two stockhold-

ers of the company asserted claims against the bankruptcy estate on two different grounds, first, as to money loaned, and secondly, as to unpaid salaries. Now, there wasn't any doubt their claim as to money loaned was fair and equitable because the records show, there was no question about it, they had actually loaned the money. The corporation had received the money; but on the question of their claim for unpaid salaries, which they themselves had fixed, the question immediately arose, was that a fair and equitable transaction. So we never got to the point of decision because we had some good lawyers in the case who proved to be good settlers on both sides and they came in with a compromise which appeared to be reasonable and it was confirmed.

However, we have got exactly the same situation here now. Assuming this arrangement to have been that each of these gentlemen was to receive a quite substantial share of the net profits, and that a portion of the net profits which they were to receive was designated as salary in any event to be paid irrespective of profits, and having in mind that only a rather small percentage of that so-called guaranteed [148] salary was paid currently, was that a fair and equitable arrangement and is it now fair and equitable to permit those claims to stand on a parity with the claims of creditors who dealt at arm's length with this corporation, and who had no interest in their transactions with the corporation except the ordinary, legitimate profit which they as business men could make. Is it fair, is it equitable now to permit these gentlemen to stand on a parity with all

these other creditors on this kind of a transaction? If these men had actually loaned money that went into the treasury of the corporation and the corporation received a hundred cents on the dollar, then we wouldn't have any doubt about it. But what were their services worth to the corporation? Were their services worth \$12,000.00 a year? Were they worth \$20,000.00 a year?

I appreciate Mr. McDonell's testimony that he had made so and so somewhere else, but we do have to recognize that we have here a defaulted business. These agreements were made in November or December of 1947 and on June 21, 1949, according to the record in the matter immediately preceding this, the creditors of the corporation requested their agent, the Los Angeles Credit Managers Association, to take some steps looking to the protection of their interests. In other words, in a comparatively short period of 14 or 15 months, during the time in which these men were to be paid these salaries, this company come almost to the door of the bankruptcy [149] court itself and did finally come into the bankruptcy court, and the Court of necessity must take judicial notice of its records and files to the extent of ascertaining that the claims are not only great in number but substantial in amount. Actually the record of the claims at the moment I think is the filing to this date of 173 different claims. I have no immediate information as to the amount of the claims, but there is a very considerable amount of money owing.

Now, there is a favorite expression that a court

operating on equitable principles as this court does always looks through the form to the substance in order that equity be accomplished and that no injustice be done. Now, if we do that here what do we find? We find that if these claims are allowed—and the claims under consideration here, simply the claims of Mr. McDonell and Mr. Egan, approximate over \$20,000.00—if these claims are allowed it will materially affect the dividends to be paid eventually on the claims of creditors who dealt with this corporation on an arm's length basis.

If we look through the form to the substance, what do we see? The form is a corporation in which these two gentlemen and Mr. Hacker were the directors at the time this transaction occurred. The substance of the thing is in effect a general partnership in which for the moment let us say there were three general partners. Two of them had no proprietary interest in the assets. Upon a liquidation they would have no share of the proceeds of the liquidation, but they did have and each of them did have a very substantial interest in the progress of the company, in the profits it might make.

Now, if they were general partners and if this were a general partnership in bankruptcy, of course their claims, even though for money loaned, would under the State law have to be subordinated to the other creditors.

So there is our consideration here, gentlemen. I go along with the claimants practically all the way so far as their view of the facts is concerned, except that I do find a great deal of indefiniteness as

business, or was it reasonable and fair for them to defer to some later date the payment of such a substantial portion of what they now say was a guaranteed salary. In other words, permitting this company to keep on. If they had had to pay these salaries every day to day, perhaps they would have folded before they did and many of these creditors might have saved a great deal of money which now they have on the books of this company. [153]

That is the point I want you to keep in mind. I'm not quarrelling so much, as I said, with Mr. McDonell having an earning capacity of \$20,000.00 or Mr. Egan having an earning capacity of \$12,000.00 although in his instance I think he didn't make that much money before.

Mr. Kronick: Well, let's take up the point further, Your Honor. What we are saying is that this corporation, despite the fact it might have been improperly run, and I say by Mr. Hacker and the other men that came in, not by those men, was doing a business of hundreds of thousands of dollars and men who handle that much business are entitled to large salaries, and I think Mr. McDonell is entitled to that salary. It is not unfair for a man of his caliber. I understand now that there are substantial assets here. Your Honor is worried about creditors. I am worried about an employee of the company. Let's worry about all of them.

The Referee: Yes.

Mr. Kronick: At the present time if there is nothing further obtained they will pay about 50 per cent which is a fairly good dividend in a bankrupt

case; and further, if these suits are successful against these other men that came in here who ruined the corporation and carried out the assets, the creditors will be paid 100 cents on the dollar.

I agree with Your Honor that everybody should be protected. The man that gives his merchandise should be protected, and the men that give labor should be protected, and [154] if his labor was given fairly that the promise he was to get \$20,000.00 and if there were profits he was to get half, that promise should be upheld. There is an agreement there. I say this meeting constituted a contract between this company and these men. These men had no interest in this corporation. They were made directors by force of circumstances because Mr. Hacker bought out his partner, Mr. Byrnes, and he owned all the stock. His natural intention would be to appoint a couple of his employees on the board of directors. He controlled the situation. They are not at fault, and I think there is a definite contract for a definite amount, and I say it is fair and I say they should not be deprived of these salaries even if they are substantial.

The Referee: All right. Do you want to be heard, counsel?

Mr. Kronick: May I be excused, Your Honor? I have to get over to another court by 5:00 o'clock, and I will leave everything in the hands of my co-counsel.

The Referee: All right, fine.

Mr. Gilbert: I would add, Your Honor, on behalf of Mr. Egan, for one year his salary was being

set at \$12,000.00 a year. I think Your Honor very aptly put the matter of ethics in the case, the matter of services rendered, as affecting the legitimacy of the claim. On Mr. Egan's behalf I would say that there is nothing conceivably inequitable about allowing his claim for salary in the amount of \$12,000.00 [155] a year. He was an officer of the corporation as well as a director, for which he is not claiming any credit. However, he was in charge of contract sales. He was active in obtaining and negotiating the business of the corporation in such projects, such contracts and jobs, as he testified, as Ohrbachs, the Carnation Building, the Prudential Life Building, the General Petroleum Building, involving hundreds of thousands of dollars of work and business of the corporation. That is his work, this floor covering line is his work. He is engaged in it presently. He is considered to be capable and efficient at his work, and is presently engaged.

He is asking for the difference between what he was paid in the sum of \$150.00 a week for some 28 or so weeks and the amount of \$230.77 a week, making a total difference of a mere \$80.00 a week for such time as he was employed, excepting the period of 23 weeks when he, and it was pointed out in his testimony that he suggested that their drawing account or their drawing salaries be reduced voluntarily to \$100.00 a week to give the corporation added cash and added strength. Certainly you can't condemn him for that practice. He had an interest in the corporation. I would add he is a man of family, three children. Certain his labors and efforts were

comparable to that of any other employee, it being testified to by one witness very capably that these people were working day and night until 9:00 o'clock at night, seven [156] days a week, and I feel that a claim of an employee under such circumstances has a greater weight and should have a greater weight with the Court than that of a mere furnisher of material who expects a loss in doing business, who expects to make a profit out of what he furnishes to the corporation, and it now comes in as a general creditor and is not subject to any objection or criticism by the Trustee.

I would also say on behalf of my client, and it was counsel's intention at the time to get around his expression, "guaranteed salary," which was injected into the testimony at an earlier point, that it was not understood that there was any guarantee out of a share of the profits but that there was a basic, agreed salary at which Mr. Egan was employed.

I wouldn't argue with the Court on the point of interpretation there except that it is my honest recollection that that was brought up.

Now, we have seen through Mr. Hacker's testimony that—and it was counsel's hope at one point to show that Mr. Hacker did intend in his own mind to pay these gentlemen these salaries and these profits if and when he was able to. Well, I submit that what Mr. Hacker intended, and I think the Court may infer that correctly from the testimony that has taken place,—you see what he did with Mr.

Gold, keeping the agreement out of the record, his making a side deal with one employee without letting another employee [157] know—all of those things certainly couldn't affect the good faith of these other employees, and I am pleading especially for Mr. Egan, who upon an offer and an agreement which is binding upon the corporation executes an instrument as part of the employment contract and who expects and is here today because he expects to be paid for his services, which I again say is reasonable and fair.

The Referee: All right, anything further? Well, I appreciate the situation these gentlemen are in, and I place more reliance on the testimony of these claimants, generally speaking, than I do upon the testimony of Mr. Hacker, and I have indicated that substantially, so far as the facts are concerned, I practically go along with the facts as contended for by Mr. McDonell and Mr. Egan. But on the equitable side of the situation I cannot see how in equity and in justice this can be held to be a fair and reasonable and enforceable transaction against this bankruptcy estate because if I follow your view of the evidence, that Mr. McDonell was to get 30 per cent of the profits in addition to a salary of \$20,000.00, and that Mr. Egan was to get—what is it?

Mr. Egan: \$12,000.00.

The Referee: No, your percentage.

Mr. Gilbert: Well, here is the way it stood, Your Honor. Mr. Hacker was to get half, out of which he was supposed to take care of Mr. Mauger and Miss

Harris. The remaining 50 per cent was to be divided among four employees, Mr. [158] McDonell who was to receive 30 per cent of the 50, the balance being divided between these three lesser employees.

The Referee: Then Mr. McDonell was to receive 5 per cent in addition to the \$20,000.00, where according to my view of the evidence he was to get 5 per cent of the profits with a minimum of 20,000.00.

So according to your recollection of the record he had a greater stake in the success of the business than according to my view of the evidence, and that is why it appears to me that it is inequitable and unfair, and that this transaction is inequitable and unfair, in that when the business failed these men assert that they are creditors on a parity with all the other creditors for such substantial sums of money.

Mr. Gilbert: May I just say this, Your Honor. Both of these gentlemen are not claiming or conceding that they are entitled to any share of the profits of the corporation. I made that statement when I first appeared, that we are not concerned with the problem of profits because there are none, we will admit that, but this agreement we say is separate and separable from the matter of profits. These men were—well, what were they? They were nothing but employees of the corporation. Now, if Your Honor presumes to say that Mr. McDonell is not worth \$20,000.00 a year, I should say that is quite an assertion in view of the showing of what his ability is, what he received in the past, and [159]

what services he performed for this particular organization, a company, a corporation, with five stores and outlets and doing the volume of business that this corporation was doing, and when he was brought into the picture and they added another line the thing started to pick up, and but for the situation that arose afterwards due to the internal strife and the tactics of the proprietary interests, this corporation went down, and to say that these gentlemen are not entitled to such basic salaries as they were promised and as they worked for and have earned is going the distance; and I would just add this—would the Court—I am here actually on behalf of Mr. Egan. Would the Court consider each of these claims as a separate and distinct—

The Referee: I don't think there is any distinction as between the claim of Mr. Egan and Mr. McDonell. I think the principles we have been talking about apply equally to both claims.

Mr. Gilbert: Well, there is a difference between \$12,000.00 and \$20,000.00.

The Referee: I don't think the amount makes any difference.

The next important situation is the one about the cutback. There isn't any doubt but what the employees in voluntarily accepting a cut in pay expected that they would at some later date get that money back. What do you think about that, Mr. McDonnell? [160]

Mr. McDonnell: Well, Your Honor, I think that that is a very accurate statement. The employees expected to get it back, and to give Mr. Hacker his

due, I think Mr. Hacker testified quite clearly he expected they would get it back if the company was successful as he expected it to be.

You must remember that all these people entered into this agreement with Mr. Hacker voluntarily because the company was in a tight spot financially from the standpoint of liquid assets, with the expectation he would be able to pay it back. Unfortunately those sanguine hopes were not fulfilled. I think it was testified there was no definite open statement the money would be paid back to them. Mr. Hacker's statement as to his intent to pay it if and when he got the ability perhaps represents a difference that existed in his mind from that which existed in the minds of his hearers at the meeting which was evidently held at the Broadway store. I think, however, there was no contract on the part of this corporation to pay back the salary cuts, and on that basis these claims, insofar as they are based on this salary cut, should not be allowed.

The Referee: Well, much as I regret it, I'm afraid I will have to agree with you. I wish we could find some legal way to allow these cut-back claims, but I can't find anything in the record which would bring these claims at any time to a maturity. I don't know when any of these people could have filed a cause of action against this corporation [161] for the cut-backs. I think it was simply a situation on the part of the employees and an intendment on the part of Mr. Hacker that as and when it could be done it would be done. That time never came; and I would particularly like to find a way to allow these

claims because of the inequities of the situation on this point. Mr. McDonell didn't get any cut because Mr. Hacker says, "I felt he needed the money," so somehow or other he got his. Mr. Mauger I think served notice he was going to quit and Mr. Hacker gave him his cut-back.

Is there something you wanted to say on that, sir?

Mr. Gilbert: Well, since the matter of facts is being injected, Mr Egan left the corporation some considerable time before Mr. McDonell. I believe he left in—was it October of 1948—when the situation was becoming more unsatisfactory, and if the Court would care to be informed on that point he consulted with me at that time on the matter of bringing an action against the corporation for his back salary and monies owed to him, and I say it is not inconceivable that such a cause of action existed and that these gentlemen in fact hoped or intended to receive any of this money back at the time. It was Mr. Egan who suggested——

The Referee: Oh, I say they expected to get it back.

Mr. Gilbert: Then why are they in no better position than the creditors of the corporation? [162]

The Referee: There is no binding obligation on the part of the corporation to pay them back at any particular time.

Mr. Gilbert: Well, they were the corporation. They were two of the directors. I don't know where the mind of the corporation lay in this matter. It would give Mr. Egan and Mr. McDonell the power, as far as the power of the corporation goes, to de-

termine these matters. I think these two gentlemen did hold the majority vote in the corporation. I think we are reaching a point where we are discriminating against employees in favor of general creditors.

The Referee: No, we are not discriminating against anyone. We have to simply take the matter as we find it.

Now, how about the bonus matter?

Mr. McDonnell: In the bonus matter, I think the same unfortunate mental situation existed there concerning that. First of all, I would like to observe that Christmas bonuses customarily are a gratuity, a gift; but that aside, the letter I believe—was that not introduced in evidence?

The Referee: Yes.

Mr. McDonnell: The letter itself indicates very clearly that it was the hope, the expectation of the corporation that they be in position to pay Christmas bonuses, and I believe that was probably what their idea was, but that was not a binding contract, again. There was no definite contract to pay irrespective of what happened. [163]

I think that there again unfortunately they perhaps did not have a binding contract with the corporation.

Mr. Gilbert: Well, I don't know where a binding contract line can be drawn with a corporation if counsel's reasoning is correct. Maybe you shouldn't be an employee if the corporation is going into bankruptcy.

The Referee: Well, there isn't any evidence upon

which the Court can find there was a binding contract by the corporation to pay these bonuses.

The remaining claim is the matter of Mr. Gregory. I am unable to find there was any contract at all with respect to that balance of salary he claims. Mr. Gregory has, however, one or two other items.

Mr. McDonnell: Are you referring to the \$150.00 unpaid for January, 1949, salary?

The Referee: No, let's see what it is.

Mr. McDonnell: \$100.00 car expense.

The Referee: He has got \$100.00 car expense. What do you say should be done with that?

Mr. McDonnell: Well, this is purely an interpretation of Mr. Gregory's testimony, but I got the feeling, perhaps erroneously but I still have it,—but I got the feeling that the \$100.00 was actually a portion of his salary rather than any expense.

The Referee: In other words, you think it should be allowed? [164]

Mr. McDonnell: I think it should be as compensation.

The Referee: What about his claim for vacation?

Mr. McDonnell: The testimony on that point, Your Honor, is very conflicting, and I believe Mr. Gregory testified that he had a vacation in 1948.

The Referee: Well, I don't remember that, but the whole vacation system is so indefinite that the Court can't make a finding that the employee was absolutely entitled to a vacation. Miss Harris, I think, put it this way, "He gave me one week one year and then the next year he gave me three weeks to make up for the other year," and so on. So it

seemed to be just a progressive situation from time to time.

Well, this may seem very odd, but the only thing I can allow here is a hundred dollars.

Mr. McDonnell: To Mr. Gregory?

The Referee: Yes. The claim of Alice Corinne Harris that is based solely upon cut-back and bonus is disallowed. The claim of Roy B. Smith based solely on cut-back and bonus is disallowed. The claim of John B. Madison is disallowed. The claim of J. J. McDonell—is that solely for salary? Your claim is for salary solely, is it?

Mr. McDonell: Yes, Your Honor.

Mr. McDonnell: No. 7 and 8.

The Referee: The claims of Mr. McDonell are allowed as general, priority denied, claims subordinated to all other allowed claims. [165]

* * *

[Endorsed]: Filed July 11, 1950.

[Endorsed]: No. 12908. United States Court of Appeals for the Ninth Circuit. J. J. McDonell, Appellant, vs. Paul W. Sampsell, Trustee of the Estate of Hacker-Byrnes Corporation, bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 23, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12,908

J. J. McDONELL,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee, etc.,

Appellee.

STATEMENT OF POINTS

The appellant states that the Points upon which he intends to rely on the appeal in this matter, are as follows:

(1) The Order Affirming Referee re: Claim of J. J. McDonell against Hacker-Byrnes Corporation, a corporation, bankrupt, is erroneous in that it ignores the fact that the contract of employment between the appellant and said bankrupt was entered into in good faith by the parties thereto and that at the time same was entered into, said corporation was not insolvent.

(2) Said Order is erroneous in that, although the Referee found that the amount claimed under the employment contract was a valid and enforceable debt, said Referee, without sufficient cause, subordinated the payment thereof to other general creditors.

(3) Said Order is erroneous in that it disregards

the fact that the appellant was only a "dummy" officer and director of the bankrupt corporation and had no financial interest therein whatsoever.

(4) Said Order is erroneous in that it disregards the fact that the contract of employment was entered into in good faith by the parties and that there was no fraud or unfairness connected therewith.

(5) Said Order is erroneous in that it ignores the fact that the amount of salary agreed to be paid to the appellant was fair and reasonable, considering his experience and his rate of remuneration immediately before becoming employed by the bankrupt corporation.

(6) Said Order is erroneous in that it ignores the fact that at the time the bankrupt corporation made an assignment for the benefit of creditors and later when it was adjudicated a bankrupt, the appellant was not an officer or director thereof, but had resigned more than six months prior to said adjudication at the request of new financial interests which had come into the corporation.

(7) Said Order is erroneous in that it affirms a finding of the Referee that appellant's employment with the bankrupt corporation, amounted to a joint venture, when in fact there is no evidence to substantiate said finding.

(8) Said Order is erroneous in that it ignores the fact that if the appellant was paid his claim pro-rata with other creditors, it would not amount to

an unjust enrichment when consideration is given to the value of his services and his previous experience.

(9) That said Order is erroneous in that it ignores the fact that there is no evidence of moral turpitude or any breach of duty by the appellant whereby other creditors have been deceived to their damage or that any act or conduct of his, caused the corporation to become insolvent.

(10) That said order is erroneous in that it ignores the fact that the law makes no distinction between general creditors because one may have rendered services and the other had delivered merchandise.

(11) That said Order is erroneous in that it disregards the fact that no evidence was adduced which could in any manner tend to show that appellant's contract of employment was unfair, inequitable or unjust insofar as other creditors of the bankrupt corporation were concerned.

(12) That said Order is erroneous in that it does not take into consideration and the Referee refused to admit testimony, showing the extent and the magnitude of business transacted by the corporation during appellant's employment therewith.

(13) That said Order is erroneous in that it ignores the fact that the corporation began having financial difficulties in the latter part of 1948, at

which time the appellant was not a director or officer thereof.

Dated: May 7th, 1951.

BENJAMIN & KRONICK,
/s/ By ROBT. I. KRONICK,
Attorneys for J. J. McDonell,
Appellant.

Acknowledgment of Service attached.

[Endorsed]: Filed May 9, 1951. Paul P. O'Brien,
Clerk.

Title of U. S. Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD
ON APPEAL

To the Clerk of the Above Entitled Court:

J. J. McDonell, appellant above named, hereby designates the following portions of the record to be contained in the record on appeal in the above entitled matter:

- (1) Involuntary bankruptcy Petition against Hacker-Byrnes Corporation.
- (2) Petition for Order referring proceedings to referee.
- (3) Order of General Reference.
- (4) Order of Adjudication.
- (5) Two claims of J. J. McDonell.
- (6) Objections of Trustee in Bankruptcy to claims of J. J. McDonell.

(7) A transcript of the evidence taken before Honorable Benno M. Brink, Referee in Bankruptcy on January 11, 1950 and January 20, 1950, being that portion of the reporter's transcript of hearings on objection to claims, prepared by H. A. Singeltary, commencing at line 12, page 34 with the testimony of J. J. McDonell, to and including line 16, page 136 and commencing at line 1, page 140 to and including line 26, page 165.

(8) Findings of Fact and Conclusions of Law and Order of Objection to Claims, signed by Referee Brink.

(9) Petition of J. J. McDonell for Review of Order on Objection to his Claim.

(10) Referee's Certificate on Petition for Review of Order on Objections to Claim of J. J. McDonell.

(11) Order Confirming Referee's orders on objection to claims of J. J. McDonell and others, dated February 21, 1951.

(12) Notice of Appeal.

(13) This Designation of Record on Appeal.

Dated: May 4th, 1951.

BENJAMIN & KRONICK,
/s/ By ROBT. I. KRONICK,
Attorneys for Appellant.

Acknowledgment of Service attached.

[Endorsed]: Filed May 9, 1951. Paul P. O'Brien,
Clerk.